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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND,

PETITIONER,

v.

BOROUGH OF KENILWORTH, NEW JERSEY,

RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITION FOR WRIT OF CERTIORARI

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102 pp

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QUESTION PRESENTED FOR REVIEW

Whether a local taxing authority or state court may define the term "school" so as to exclude an apprentice school operated by a trade union from the protection of the New Jersey statute exempting school property from real estate taxes when such definition is inconsistent with established federal and state law, and the public policy of supporting educational opportunity.

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OPINIONS BELOW

In 1991, Respondent Borough of Kenilworth denied Petitioner New Jersey Carpenters Apprentice Training and Education Fund's request that its property be exempted from taxation as property being used for a school. Petitioner based its application for an exemption from property taxes upon N.J.S.A. 54:3-3.6, which states that "all buildings and land actually used for 'schools'" by nonprofit organizations are exempt from property taxes. The County Board of Taxation affirmed the tax assessment on the property.

On September 23, 1994, the Tax Court of New Jersey orally affirmed the County Board's decision during a telephonic conference between the court and counsel for the parties. The Tax Court upheld the County Board of Taxation's conclusion that Petitioner's property was not exempt from taxation. The transcript of the Tax Court's opinion is set forth in the Appendix beginning at A-41. The Tax Court judgment was entered on September 29, 1994 and is set forth in the Appendix at A-39.

On October 16, 1995, the Superior Court of New Jersey, Appellate Division, reversed the Tax Court of New Jersey and held that Petitioner is entitled to an exemption from taxation of its real property. The Appellate Division's opinion is reported as *New Jersey Carpenters Apprentice Training & Education Fund v. Borough of Kenilworth*, 284 N.J. Super. 521, 665 A.2d 1128 (App. Div. 1995), and is set forth in the Appendix beginning at A-27.

On December 17, 1996, the Supreme Court of New Jersey reversed the Superior Court of New Jersey,

Appellate Division, and held that Petitioner is not a "school," as that term is used in the statute granting exemption from taxation to property being used as a school. The Supreme Court of New Jersey's decision is reported as *New Jersey Carpenters Apprentice Training & Education Fund v. Borough of Kenilworth*, 147 N.J. 171, 685 A.2d 1309 (1996), and is set forth in the Appendix beginning at A-1.

STATEMENT OF JURISDICTION

The ruling of the Supreme Court of New Jersey sought to be reviewed was rendered on December 17, 1996. This Court has jurisdiction to review that order under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 provides as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had[] may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

26 U.S.C. § 501(c)(3) provides as follows:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its

> activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

N.J. Const. art. 8, § 1, ¶ 2 provides as follows:

> Exemption from taxation may be granted only by general laws. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

N.J.S.A. 54:4-3.6 reads in pertinent part as follows:

> **54:4-3.6. Exemption of property of nonprofit organizations**
>
> The following property shall be exempt from taxation under this chapter: all buildings actually used for colleges, schools, academies or seminaries, provided that if any portion of such buildings are leased to profit-making organizations or otherwise used for purposes which are not themselves exempt from taxation, said portion shall be subject to taxation and the remaining portion only shall be exempt[:]
> . . . the land whereon any of the buildings hereinbefore mentioned are erected, and which may be necessary for the fair enjoyment thereof, and which is devoted to the purposes above mentioned and to no other purpose and does not exceed five acres in extent; the furniture and personal property in said buildings if used in and devoted to the purposes above mentioned[.]

The full text of N.J.S.A. 54:4-3.6 is set out in the Appendix beginning at A-65.

STATEMENT OF THE CASE

Petitioner, New Jersey Carpenters Apprentice Training and Education Fund ("Petitioner"), is an Internal

Revenue Service-approved Taft-Hartley trust fund. Petitioner was established on November 1, 1969 in accordance with a collective bargaining agreement. Petitioner is exempt from the payment of federal income tax under § 501(c)(3) of the Internal Revenue Code. (A-3.)

In 1990, Petitioner purchased real property and improvements thereon in the Borough of Kenilworth. Petitioner uses the subject property to provide facilities for the training of apprentice carpenters. (A-4.) In 1991, Petitioner applied to the Borough for an exemption from property taxes with respect to the subject property. Petitioner based its application for an exemption from property taxes upon N.J.S.A. 54:4-3.6, which exempts all buildings and lands upon which they are situated from taxation if such buildings and land are "actually used for schools." Petitioner argued that its apprentice training facility is a school under N.J.S.A. 54:4-3.6.

In each year of the four-year apprenticeship program, apprentice carpenters are required to attend 160 hours of training at the Kenilworth training center. (A-5.) The program meets state and federal Department of Labor standards. (A-6.)

Students at the Kenilworth training center pay absolutely nothing for their training. There is no charge to the students for tuition, books, materials, or supplies. (A-4.) Admission to the program is open to the public. Union membership is not a prerequisite to admission. The program has no restrictions in terms of race, color, or sex. Petitioner and the Federal Bureau of Apprentice Training recruit students for the program by advertising in newspapers, by attending career days at high schools and

vocational schools, and by contacting unemployment agencies. Students are required only to have either a high school diploma or an equivalency degree. (*Id.*)

In the fall of 1991, Borough of Kenilworth (Respondent) denied Petitioner's application for an exemption from property taxes for the tax year 1992. (A-8.) The Union County Board and the Tax Court of New Jersey respectively declined to overturn Respondent's assessment. (*Id.*) On October 16, 1995, the Appellate Division, holding that Kenilworth is a tax-exempt "school" under N.J.S.A. 54:4-3.6, reversed the judgment of the Tax Court. (*Id.*)

On December 17, 1996, the Supreme Court of New Jersey overturned the decision of the Appellate Division. The New Jersey Supreme Court concluded that the training facility operated by Petitioner is not a school (A-23) and therefore is not exempt from taxation under the New Jersey statute exempting school property from taxation. (A-24.) The court expressly noted in its decision that its definition of a "school" contradicts the Internal Revenue Service's definition of that term:

> The Internal Revenue Service also has adopted a broad definition of "educational" institutions in *I.R.C.* § 501(c)(3), which provides an exemption to "corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes." It includes "'schools' as one might colloquially think of them: institutions with a regularly scheduled curriculum . . . including primary and secondary school[s],

> colleges, professional schools, and trade schools." Colombo, *supra*, 35 *Ariz. L. Rev.* at 847.

(A-22.)

In short, the Supreme Court of New Jersey explicitly acknowledged that its definition of a "school" is repugnant to the definition of that term under federal law.

ARGUMENT

THE SUPREME COURT OF NEW JERSEY CONSTRUED AND APPLIED N.J.S.A. 54:4-3.6 IN A WAY THAT IS REPUGNANT TO ESTABLISHED FEDERAL AND STATE LAW.

A. This Court Has Jurisdiction To Hear This Case Because The New Jersey Supreme Court Construed And Applied A State Statute In A Way That Is Repugnant To Established Federal Law.

Under the federal statute giving this Court jurisdiction to hear appeals from state courts, this Court may hear an appeal from a decision by the New Jersey Supreme Court "where the validity of a [New Jersey] statute . . . is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a).

Even if a petitioner to this Court has not properly pointed out the existence of a repugnancy between a state statute and federal law, this Court will allow the petitioner to come before the Court. In *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629-30 (1960), this Court held:

> On the question of jurisdiction, we believe that appellant did not make the required "explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal

> Constitution, treaties or laws. * * * . . . The appeal is therefore dismissed. While the case is not properly here by appeal, we treat the same as a petition for certiorari under 28 U.S.C. § 2103, 28 U.S.C.A. § 2193. The petition is granted.

This Court reached a similar conclusion in *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185-87 (1945):

> Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134, 34 S.Ct. 874, 877, 58 L.Ed. 1245; Chicago, R.I. & P.R. Co. v. Perry, 259 U.S. 548, 551, 42 S.Ct. 524, 525, 66 L.Ed. 1056; Saltonstall v. Saltonstall, 276 U.S. 260, 267, 48 S.Ct. 225, 72 L.Ed. 565; Home Ins. Co. v. Dick, 281 U.S. 397, 407, 50 S.Ct. 338, 341, 74 L.Ed. 926, 74 A.L.R. 701; Nickey v. Mississippi, 292 U.S. 393, 394, 54 S.Ct. 743, 78 L.Ed. 1323; Whitfield v. Ohio, 297 U.S. 431, 435, 436, 56 S.Ct. 532, 533, 80 L.Ed. 778.

The authorities cited demonstrate that if the Supreme Court of New Jersey construed or applied the New Jersey statute exempting "school" use property from taxation in a way that is repugnant to United States law, this Court must accept jurisdiction over Petitioner's appeal as a matter of law, and grant Petitioner's request for a writ of certiorari.

Section 501(c)(3) of the Internal Revenue Code has been construed a number of times in ways that demonstrate that an apprentice training facility like the Petitioner's is a school, and should be tax-exempt. Explaining § 501(c)(3), the Treasury Regulations state that a facility is educational if its use relates to

> The instruction or training of the individual for the purpose of improving or developing his capabilities[.]

Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(a).

Included among examples of educational facilities, the Treasury Regulations lists a "trade school." Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii).

The Internal Revenue Service has also acknowledged that an apprentice training facility like Petitioner's will satisfy the requirements for tax exemption under § 501(c)(3). For example, in Rev. Rul. 67-72, 1967-1 C.B. 125, 125-26, the IRS considered a school almost identical to the one operated by Petitioner:

> An organization created by representatives of both labor and management to conduct an industrywide

apprentice training program in a certain city has applied for exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954.

The organization was created as a result of a bargaining agreement and is operated under the joint trusteeship of representatives of both labor and management. Interested individuals make application to the organization to enroll in the training program. The trustees select individuals for the training program from the applicants, arrange for their classroom and on-the-job training, and provide the books and supplies used in the training. Upon completion of the training the individual is qualified to seek employment as a journeyman anywhere in the industry. The organization has no other activities.

. . . .

By selecting individuals for an apprentice training program which it conducts and by providing the necessary books and supplies, the organization is assisting in the training of individuals for the purpose of improving or developing their capabilities. Accordingly, the organization is exempt from Federal income tax under section 501(c)(3) of the Code.

The IRS recognized that an apprentice training school like the one operated by Petitioner primarily

benefits its students by training them in skills necessary to their employment. 1967-1 C.B. at 125-26.

In 1972, the IRS reaffirmed its decision in Rev. Rul. 67-72 when it concluded that an apprentice training school operated by a union was a tax-exempt educational facility. Rev. Rul. 72-101, 1972-1 C.B. 144. The IRS described the school in question in terms almost identical to Petitioner's school:

> The organization was created as a result of collective bargaining agreements in an industry. The purpose of the organization is to train individuals working or desiring to work in that industry. Trustees are selected by representatives of labor and management. Under the terms of the agreements participating employers make a contribution to the organization measured by the number of man-hours worked by their respective employees. This is the sole source of funds for the organization.
>
> . . . Students are selected by the trustees from individuals applying to the organization for enrollment in its training program to acquire skills in the industry. Expenditures are for the operation of the school.

1972-1 C.B. at 144-45.

Holding the school at issue to be exempt, the IRS pointed out the benefits of an apprentice training facility to society:

> By conducting a training school for individuals desiring to acquire skills in an industry, the organization is training individuals for the purpose of improving or developing their capabilities. Accordingly, it is held that the organization is exempt from Federal income tax under section 501(c)(3) of the Code. See Revenue Ruling 67-72, C.B. 1967-1, 125, which holds that an organization created as a result of collective bargaining agreements in an industry, supported by contributions from both labor and management, and which conducts an apprentice training program is exempt from Federal income tax under section 501(c)(3) of the Code.

Id. at 145.

The federal authorities cited above make it clear that Petitioner's apprentice training facility is a "school" under federal law. Nevertheless, the Supreme Court of New Jersey expressly ignored the fact that Petitioner's facility is a "school" under federal law. (A-22.) In fact, the Supreme Court of New Jersey expressly acknowledged that its definition of "school" and the federal definition of that term are in sharp conflict. (*Id.*) By disregarding the federal precedent, and ruling that Petitioner's facility is not a "school," the New Jersey court created an unnecessary and erroneous repugnancy between state and federal law

as to what constitutes a school. Therefore, this Court has jurisdiction under 28 U.S.C. § 1257 to hear this appeal.

B. The Supreme Court Of New Jersey Construed And Applied N.J.S.A. 54:4-3.6 In A Way That Is Repugnant To Established State Law.

Schools are included among the institutions which the New Jersey legislature chose to exempt from taxation in N.J.S.A. 54:4-3.6, which, in relevant part, provides:

> **54:4-3.6. Exemption of property of nonprofit organizations.**
>
> The following property shall be exempt from taxation under this chapter: all buildings actually used for colleges, schools, academies or seminaries, provided that if any portions of such buildings are leased to profit-making organizations or otherwise used for purposes which are not themselves exempt from taxation, said portion shall be subject to taxation and the remaining portion only shall be exempt[:] . . . the land whereon any of the buildings hereinbefore mentioned are erected, and which may be necessary for the fair enjoyment thereof, and which is devoted to the purposes above mentioned and to no other purpose and does not exceed five acres in extent; the furniture and personal

> property in said buildings if used in and devoted to the purposes above mentioned[.]

By its terms, the statute exempts from property taxation any building and the land on which it is situated if such property (1) is exclusively used as a school, and (2) is "not conducted for profit." *See Kimberley School v. Town of Montclair*, 2 N.J. 28, 37, 65 A.2d 500, 504 (1949) ("It is our conception that the test imposed by the statute is simply . . . whether or not the school is 'conducted for the purpose of making a profit'" (quoting *Institute of Holy Angels v. Bender*, 79 N.J.L. 34, 36, 77 A. 1035, 1035 (Sup. Ct. 1909))). It is manifest in the case at bar that, in the tax year in question, the Kenilworth training center was a school which was not conducted for profit.

New Jersey precedent has recognized that the terms set out in N.J.S.A. 54:4-3.6 must be read with some flexibility in order to accomplish the statutory objective of supporting societally beneficial organizations such as schools. Construing "college," a related term in the statute, the court in *Township of Princeton v. Institute for Advanced Study*, 59 N.J. Super. 46, 53-54, 157 A.2d 140, 141 (App. Div. 1960), wrote:

> We do not understand "college" to be a word of art which, by universal understanding, has acquired a definite, unchanging significance in the field of education, fixed forever in its meaning like a bug in amber. . . .
>
> Is the Institute to be barred from exemption from taxation of a component building because the members, already

> possessing doctorate degrees, cannot receive further academic honors? Or because the illustrious few scholars who are chosen to study there are deemed to profit most by introspective and individual research, rather than by instruction in the more usual teacher-pupil relationship? Is exemption to be denied merely because discipline, in the strict sense of the word, is kept at a minimum because of the very quality of those constituting the Institute and their particular and individualized pursuit of knowledge and ideas? To do so is to impose an arbitrary limitation on the legislative intent, to ignore the clearly discernible evolution in modern-day higher education toward less formal instruction, with greater emphasis on individual study and creative research—a development which has arrived at its greatest refinement in the activities of the Institute.

Thus, the court recognized that the mission of the statute requires enough flexibility to recognize the variety of educational institutions which offer a societal benefit worthy of the legislature's support and protection.

The Supreme Court of New Jersey has also indicated that the tax exemption for nonprofit schools is not limited to traditional primary or secondary schools. *Township Committee of Denville v. Board of Education of Vocational School in County of Morris*, 59 N.J. 143, 279 A.2d 842 (1971). The *Township of Denville* case involved a dispute over whether a proposed public vocational school would be exempt from a city's zoning restrictions.

In the *Denville* case, the proposed school would have offered day classes to high school students and night classes, including apprentice programs for carpenters and electricians, to adults. 59 N.J. at 145-46, 279 A.2d at 843-44.

The *Denville* court first held that the vocational school would be subject to the restrictions. 59 N.J. at 150, 279 A.2d at 846. A statute forbidding discrimination between public and private "day schools," explained the court, indicated a legislative recognition of the right of a municipality to control the location of a *vocational school* by zoning. The proposed vocational school was, the court decided, a "day school" under the statute. 59 N.J. at 148, 279 A.2d at 845.

Significantly, the *Denville* court then turned its attention to the county board's contention that the City had adopted the zoning restriction in order to avoid the loss of taxable property, which would occur if the school were built. The court's treatment of the issue clearly evidences its belief that a facility in which vocational programs are held is a "school" which may be exempt from property taxes:

> We have indicated that a municipality may consider its revenues in planning for a well-balanced community. But we have also said that a school may not be barred from a municipality or from a zone solely because the tax exemption may be burdensome; nor may a variance be denied solely for that reason. *Educational institutions, such as public vocational schools, are tax free as a matter of*

> *paramount State policy which cannot be thwarted by exclusionary zoning.*

59 N.J. at 150, 279 A.2d at 846 (quoting *Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough*, 42 N.J. 556, 565-66, 202 A.2d 161, 166 (1964) (emphasis added)). One can only conclude from the language in *Denville* that vocational programs such as the Kenilworth training center are schools, for purposes of N.J.S.A. 54:4-3.6.

In holding that Petitioner's apprentice training school is not a school for the purposes of receiving a tax exemption, the Supreme Court of New Jersey misconstrued its earlier decision in *Textile Research Institute v. Township of Princeton*, 35 N.J. 218, 172 A.2d 417 (1961). In *Textile Research*, the *raison d'être* for the educational institution was *the research which resulted from the institution's operation*, and not—as is the overriding purpose of the Kenilworth facility—*the instruction of students*. 35 N.J. at 221, 172 A.2d at 418. Indeed, in *Textile Research*, the "college" (1) undertook research according to the interests of member companies roughly in proportion to the dues contributed, (2) sent a monthly report disseminating the results of the textile research only to member companies, and (3) restricted access to the results of research projects supported by individual member companies to the particular sponsor for a two-year period. 35 N.J. at 220, 172 A.2d at 418. The *Textile Research* court concluded that the institution was not entitled to an exemption under N.J.S.A. 54:4-3.6 because

> the word "college" does not embrace an organization which is controlled by a particular profit-making segment of society

> and which is devoted principally and primarily to research for the benefit of that industry.

35 N.J. at 222-23, 172 A.2d at 419.

Contrary to the Supreme Court of New Jersey's holding (A-14-17), the *Textile Research* case is inapposite to the case *sub judice*. Unlike the educational institution in *Textile Research*, the Kenilworth training center at issue here produces *no research* which benefits *only unions or employers* in the building construction industry. Rather, the focus of the instruction provided at Petitioner's facility is *the enhancement of its students' knowledge and skills*. Such a purpose is entirely consonant with the underlying purpose of the exemption statute. *See Township Committee of Denville v. Board of Education of Vocational School in County of Morris*.

Finally, the Supreme Court of New Jersey attempted to demonstrate that Petitioner's school is a for-profit operation. The Court overemphasized the significance of the fact that Petitioner's Board of Trustees is composed of representatives of the carpenters' union and businesses employing carpenters. The fact that Petitioner's Board of Trustees is made up of union and employer representatives is not outcome-determinative with respect to the issue of whether Petitioner's Kenilworth facility is operated for profit. The case law is clear that it is the *uses to which property is put*, rather than the personal status of the party controlling it, that determines whether the property is exempt from taxation. *See, e.g., New Jersey Turnpike Authority v. Washington Township*, 16 N.J. 38, 45, 106 A.2d 4, 8 (1954) ("Exemptions from taxation [for] property, real or personal, that are based not upon any

characteristic possessed by such property, or upon the uses to which it is put, but upon the personal "status of the owners of such property, are void" ' " (quoting *Tippett v. McGrath*, 70 N.J.L. 110, 113, 56 A. 134, 135 (Sup. Ct. 1903), *aff'd*, 71 N.J.L. 338, 59 A. 1118 (E. & A. 1904))).

•

In short, *Textile Research Institute v. Township of Princeton* does not require a determination that Petitioner's training center is a for-profit enterprise. As discussed above, the court in *Textile Research* held that the educational institution at issue was not a "college" under the exemption statute because the institution's primary purpose was research, rather than education. 35 N.J. at 223, 172 A.2d at 419. The *Textile Research* court stressed that its scrutiny of ownership was *not* for the purpose of classifying the institution as a nonprofit or for-profit entity:

> Appellant protests that an examination of the membership and control of the Institute violates the principle that for tax purposes property may be classified according to characteristics or uses but not as to ownership. Appellant apparently misconstrues the purpose of the examination. *We do not embark on any process of classification.*

35 N.J. at 223, 172 A.2d at 420 (emphasis added).

The Supreme Court of New Jersey reasoned that the Kenilworth facility must be deemed a for-profit enterprise merely because the entities which "own" the facility may be for-profit. However, this attempt to classify the Kenilworth facility as a for-profit entity based on the

personal status of its owners is contrary to the law of New Jersey. *See, e.g., New Jersey Turnpike Authority v. Washington Township.*

Furthermore, the fact that Petitioner maintained a reserve fund in 1991 does not, in and of itself, defeat Petitioner's statutory right to an exemption from taxation. In *Township of Princeton v. Institute for Advanced Study*, the Appellate Division upheld the tax-exempt status of the Institute for Advanced Study although the Institute's operations were financed for the most part from income resulting from a "substantial endowment." 59 N.J. Super. at 50, 157 A.2d at 138.

Nor does the fact that Petitioner's income exceeded expenditures in 1991 preclude an exemption for the Kenilworth facility. As the Supreme Court of New Jersey has explained, the board of trustees of a nonprofit educational institution *should strive for an annual surplus*:

> We perceive nothing in the statute requiring, as a condition of tax exemption, that a non-profit educational institution must actually operate at a loss, or that it must gear its tuition rates and other receipts so as to avoid an excess of income over current expenditures. To hold that [an educational institution] may not accumulate a surplus, even though accomplished in some measure by the generosity of donors, without losing tax-exempt status, would be tantamount to declaring that such institutions may not plan on a sound fiscal basis for the replacement of antiquated facilities or the expansion of facilities . . . .

. . . .

> . . . We presume that the [educational institution] *intends* from year to year to make ends meet and probably to have a surplus at the end of the fiscal year. Ordinary business judgment demands that, and entirely consistently with the absence of a profit motive.

City of Trenton v. New Jersey Division of Tax Appeals, 65 N.J. 1, 10-11, 166 A.2d 777, 781-82 (1960) (emphasis in original); *see also Institute of Holy Angels v. Bender*, 79 N.J.L. at 36, 77 A. at 1035 ("[I]t is not enough that a profit should be made. The school must be conducted for the purpose of making a profit; i.e., as a commercial enterprise in order to be deprived of its exemption"); *Mayor & Common Council of Princeton v. State Board of Taxes & Assessments*, 96 N.J.L. 334, 338-39, 115 A. 342, 344 (Sup. Ct. 1921) ("[T]he question being whether the school is 'conducted for profit' (so as to defeat exemption) within the meaning of the act, the test is not whether there is or may be a profit, but whether the school is conducted for the purpose of making a profit; that is to say, whether the charges for tuition and board are fixed with the intention of yielding a profit over and above the actual cost").

Courts in other states have held that apprentice training or similar vocational training facilities are schools. For example, a New York appellate court once held that a joint public-private vocational school was a "school" for town zoning purposes. *In re Board of Cooperative Educational Services of Nassau County*, 33 A.D.2d 701, 306 N.Y.S.2d 216, 218 (2d Dep't 1969). Courts in other jurisdictions have also recognized that the term "school,"

as it is used in state statutory and constitutional provisions, is not limited to publicly owned and operated schools because the establishment of all kinds of schools should be encouraged. *Honohan v. Holt*, 17 Ohio Misc. 57, 244 N.E.2d 537, 544 (C.P. 1968).

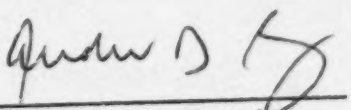
In the present case, Petitioner's apprentice training school is for students seeking to become skilled carpenters without charge to those students. That the union and the industry have banded together to provide this educational opportunity makes it no less philanthropic. As the costs of obtaining an education at a conventional college continue to rise, the need for schools like the one provided by Petitioner is self evident. The apprentice training school offers its students an opportunity to learn valuable skills and become productive members of the community employed as trained craftsmen. While benefiting the individual students by providing them with the opportunity to learn a trade, the apprentice training school also benefits the community by assuring the availability of skilled carpenters to perform construction work.

By defining "school" too narrowly in this case, the Supreme Court of New Jersey has, no doubt, discouraged unions and other private organizations from endeavoring to provide much needed vocational training and education.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Honorable Court grant the Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

Respectfully submitted,



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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND,

PETITIONER,

v.

BOROUGH OF KENILWORTH, NEW JERSEY,

RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

APPENDIX

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SUPREME COURT OF NEW JERSEY
A-12 September Term 1996

NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND,

Plaintiff-Respondent,

v.

BOROUGH OF KENILWORTH, NEW JERSEY,

Defendant-Appellant.

Argued September 10, 1996 — Decided December 17, 1996

On certification to the Superior Court, Appellate Division, whose opinion is reported at 284 *N.J. Super.* 521 (1995).

Robert F. Renaud argued the cause for appellant (*Palumbo & Renaud*, attorneys).

Andrew D. Borg argued the cause for respondent (*Oransky, Scaraggi, Borg & Abbamonte*, attorneys).

The opinion of the Court was delivered by

GARIBALDI, J.

N.J.S.A. 54:4-3.6 exempts from real property taxation any building that (1) is actually used as a "school" and (2) is "not conducted for profit." Plaintiff, the New Jersey Carpenters Apprentice Training and Education Fund (Fund), owns a building in which it operates a training center for apprentices. The question to be resolved in this case is whether that building is exempt under *N.J.S.A.* 54:4-3.6.

I

The Fund is a Taft-Hartley trust fund created under an Agreement and Declaration of Trust (Trust) in 1969. The Fund was established "for Apprentice Training and educational purposes." Four parties signed the trust agreement: (1) the New Jersey State Council of Carpenters, an unincorporated association of local trade unions and district councils affiliated with the United Brotherhood of Carpenters and Joiners of America (Union); (2) the Building Contractors Association of New Jersey, an association of employers in the building construction industry; (3) additional employers in the construction industry who are under an obligation to make contributions to the Fund by virtue of their respective collective bargaining agreements with the Union; and (4) the trustees, representatives of both the Union and the employers.

The trustees oversee the Fund's activities and investments. Originally composed of fourteen members, the board has been expanded to twenty-four members. Under the Trust, half of the trustees are appointed by the Union and half by the employers. The Union trustees serve at the will of the Union and the employer trustees serve at the will of the employers.

The Fund's purpose is described in the Trust:

> The Fund is established for Apprentice Training and educational purposes and no part of the earnings or assets of the Fund shall inure to the benefit of any private shareholder or individual or any Employer or Union.

[Trust, Art. II §4.]

To effectuate that purpose, the Trust provides that the trustees may use the funds and assets only to pay for reasonable expenses and for the payment of "Apprentice Training and Educational benefits" as permitted by the IRS and the Trust. The Fund is exempt from federal income taxes under 26 *U.S.C.A.* §501(c).

Contributions from Union employees support the Fund. Under collective bargaining agreements, all Union carpenters are obligated to contribute one percent of their wages to the Fund. The assessment is collected through employer-withholdings by those employers who have signed collective bargaining agreements.

The Trust does not grant any express power of revocation to either party, but it terminates "when there is no longer in force a Collective Bargaining Agreement between a single Employer and the Union requiring Fund Payments to the Fund." The parties, therefore, effectively have the power to revoke the Fund if they do not provide for contributions to the Fund in their collective bargaining agreements. However, the Trust does provide that, on termination, "no part of the corpus or income of this Fund shall be used for or diverted to purposes other than

Apprentice Training and Educational purposes. . . . Under no circumstances shall any of said corpus or income revert to any Employer or Union."

The Trust does grant a power of modification to the trustees upon a two-thirds vote of the trustees, but that power is limited:

> [N]o amendment shall divert the Funds then constituted or any part thereof, to a purpose other than as set forth in this Agreement, nor permit a return or payment of the assets to the Employers. . . .
>
> [Trust, Art. IX, §1.]

To comply with the Employee Retirement Income Security Act of 1974, the Trust was amended to provide that "[a]ll provisions of the Agreement which are in conflict with the Employee Retirement Income Security Act of 1974 are deleted."

To provide a training center for apprentices, the Fund purchased property in Kenilworth for $2.8 million in 1990. The Fund has a similar training center in South Jersey. The premises are used as a training facility for apprentice carpenters. The program is open to anyone, without any requirement of union membership. The only requirement is that students have a high-school diploma or equivalency degree. The Fund recruits apprentices from union locals, by advertising at high-school career days, from vocational schools, and through advertising at unemployment offices. There is no charge for tuition, books, or supplies.

Apprentices are required to work full-time in carpentry and attend the facility four weeks per year, once every thirteen weeks, for a four-year period. In order to become journeymen carpenters, apprentices must complete 160 hours of on-premises training each year over the four-year period. Apprentices who attend the training center are taken into local unions.

The training center is not a traditional school with lectures and classrooms, but instead takes a "hands-on" approach. Students must master several skills in order to become journeyman carpenters. For each skill, students watch a slide show or video. After viewing the slide show, the students attempt the skill. Instructors, who are qualified carpenters and full-time employees of the Fund, are available to answer questions, but they do not teach in a traditional manner. No academic programs are offered. Students do not receive grades, but those who fail a skill are not allowed to proceed to the next level of carpentry and may not receive accompanying raises. Reports on the apprentices are sent to the local unions on a monthly basis. As the Administrative Manager of the Fund testified:

> A. Number one, if they don't come to school—we're not—we're not disciplinarians, alright? Their home locals take care of that. We give a report to their local monthly. If they don't complete their blocks or go to school they don't go on to the next level, they won't get a raise. That's how their [sic] basically rated.
>
> Q. Okay. So there [sic]

> A. You have to complete your 160 hours a year. . . . And if they don't perform properly, get their hours in or do their work, we send a report to their home local and it's up to them to discipline them.

The school is not accredited by the New Jersey Department of Education, the Middle States Association, or any similar agency. Nor is the program established, maintained, or supervised by the New Jersey Commissioner of Education as required for vocational schools operated by school districts or county vocational school boards.[1] The United States Department of Labor, however, monitors the program, and all those who complete the program are awarded a journeyman's certificate by the Department as well as from the national union's office in Washington.

In 1991, the Fund had nine employees, five administrators and four instructors, although two instructors worked only for part of the year. Generally, the

---

[1] *N.J.S.A.* 18A:54-2 provides:

> The commissioner shall investigate the necessity for the introduction of vocational education and report thereon, from time to time, to the state board. Subject to the approval of the state board and to such rules as it may make, the commissioner shall superintend the establishment and maintenance of schools for this form of education and supervise and approve such schools as provided in this chapter.

employees were paid and given benefits in accordance with the union scale for a fifty-two-week year. The salaries for full-time employees ranged from $103,726 for the Administrative Manager to $30,379 for the Office Manager. Employees also received benefits packages equal to one-third of their salaries.

As discussed *supra*, the training center is funded by a one-percent assessment on all union wages. Through the years, this amount has exceeded the cost of the program, and the Fund has accumulated a substantial surplus. According to the Fund's 1991 Internal Revenue Service Form 990, the Fund's assets totalled $9,684,000 million at the end of 1991. The assets included land, property, and a $5,000,000 reserve fund. In 1991, the surplus grew by approximately $800,000. That year, the Fund obtained $2,350,000 from the wage assessment and $354,000 from investment income, and had costs of $2,000,000. Of the costs, only $754,000 were directly related to program services. The remainder was allocated to management and general expenses, including $230,000 for "contest expenses." The Fund is sufficiently well-off that it bought the $2,800,000 Kenilworth facility without any borrowed funds.

The revenue from the wage assessment fluctuates with the condition of the economy and the amount of wages paid to union carpenters. For example, the amount collected from wages for the four years prior to 1991 fluctuated from a low of $1,468,000 in 1987 to a high of $2,550,000 in 1990. Evidence also showed that the fund collected only $1,500,000 in 1994 because of a weak economy.

In 1991, the Fund applied to defendant, the Borough of Kenilworth, for an exemption from real-estate taxes for the training center pursuant to *N.J.S.A.* 54:4-3.6. The Fund claimed that it was operating a school that was not conducted for profit. Kenilworth denied the exemption. The County Board of Taxation affirmed the assessment. Plaintiff filed a complaint with the Tax Court of New Jersey, which found that the property was neither a school nor nonprofit and entered a judgment affirming the assessment. The Appellate Division reversed the Tax Court's decision. *New Jersey Carpenters Apprentice Training & Educ. Fund v. Borough of Kenilworth*, 284 *N.J. Super.* 521 (1995). We granted defendant's petition for certification. 143 *N.J.* 329 (1996).

II

Tax-exemption statutes are strictly construed against those claiming exemption because of the compelling public policy that all property bear its fair share of the burden of taxation. *Princeton Univ. Press v. Borough of Princeton*, 35 *N.J.* 209, 214 (1961). However, strict construction does not require "a rigid scholastic interpretation. . . . The rule of strict construction must never be allowed to defeat the evident legislative design." *Boy's Club of Clifton, Inc. v. Township of Jefferson*, 72 *N.J.* 389, 398 (1977) (quoting *Township of Princeton v. Tenacre Found.*, 69 *N.J. Super.* 559, 563 (App. Div. 1961)). Nonetheless, taxation is the rule, and the claimant bears the burden of proving an exemption.

The Fund claims an exemption from real-property taxes under *N.J.S.A.* 54:4-3.6 (section 3.6), which states in pertinent part:

> The following property shall be exempt from taxation under this chapter: All buildings actually used for colleges, schools, academies or seminaries[;] . . .. provided, in case of all the foregoing, the buildings, or the lands on which they stand, or the associations, corporations or institutions using and occupying them as aforesaid, are not conducted for profit. . . .

Thus, under the plain meaning of the statute the Fund will be exempt if it conducts a not-for-profit school.

The first prong of the statutory test for exemptions requires the training center to be a "school, academy, college or seminary." The Fund contends that it is a school, and the Appellate Division agreed because its definition of "school" included "an institution for instruction in a particular skill or field." *N.J. Carpenters Apprentice Training & Educ. Fund, supra*, 284 *N.J. Super.* at 526 (citing *Random House Unabridged Dictionary* 1715 (2d ed. 1993)). Kenilworth argues that "school" refers only to primary and secondary schools, i.e., the traditional, accredited institution with classrooms and homework, and not a union training facility with hands-on training for adults.

"Construction of any statute necessarily begins with consideration of its plain language." *Merin v. Maglaki*, 126 *N.J.* 430, 434 (1992). A statute should be interpreted in accordance with its plain meaning if it is "clear and unambiguous on its face and admits of only one interpretation." *State v. Butler*, 89 *N.J.* 220, 226 (1982). The definitions for "school" do not provide any guidance. "School," as ordinarily used, has two meanings: a broad

one, including all institutions of learning, or a more narrow one, including only primary and secondary schools. *See, e.g., Black's Law Dictionary* 1511 (4th Ed. 1951) ("An institution or place of learning of a lower grade, below a college or university. A place of primary instruction. The term generally refers to the common or public schools, maintained at the expense of the public. [citation omitted]"); 78 *C.J.S. Schools and School Districts* §2 at 37 (1995) ("The word 'school' is a generic term of many definitions denoting an institution or place for instruction or education. . . . A 'school' is a place where instruction is imparted to the young; it is an institution of learning of a lower grade, below a college or university."); *but see* 84 *C.J.S. Taxation* §283 at 566 ("[A]s used in the exemption laws, has been defined as any institution of learning."). The Fund's training facility would be considered a school under the broad definition because it serves as an institution of learning. Under the narrower definition, the facility is not a primary or secondary school.

Arguably, the language of section 3.6 supports an inference that the Legislature intended to adopt a narrow interpretation of "school." Section 3.6 exempts "colleges, schools, academies or seminaries." A college, of course, is a post-secondary institution awarding bachelor or associate degrees and often doctorates as well. An academy is "an institution of learning. . . . In later use, a species of educational institution, of a grade between the common school and the college." *Black's Law Dictionary, supra*, at 26. A "seminary" is "[a] place of training, an institution of education, a school, academy, college or university in which young people are instructed in several branches of learning which may qualify them for their future employment." *Id.* at 1526. Therefore, the statute

includes "schools," and all forms of post-secondary educational institutions. If "school" is read broadly to cover all institutions of learning, the other terms in the statute are superfluous; obviously, all colleges, academies, and seminaries are institutions of learning. If, on the other hand, "school" is read narrowly to include only primary and secondary schools, then the terms "college," "academy," and "seminary" are given their usual definitions. This Court has held that statutory "construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided." *State v. Reynolds*, 124 *N.J.* 559, 564 (1991).

No published New Jersey case has ever defined the word "school" in the context of this statute. Although many cases have considered this exemption, they have all focused on the "for-profit" element without discussing the definition of "school." Each of those cases, however, has involved a primary or secondary school. *E.g.*, *Kimberly Sch. v. Town of Montclair*, 2 *N.J.* 28, 30 (1949) (private day school for children); *Carteret Academy v. State Bd. of Taxes & Assessments*, 98 *N.J.L.* 868 (E. & A. 1923) (private school for boys); *Princeton Country Day Sch. v. State Bd. of Tax Appeals*, 113 *N.J.L.* 515, 518 (Sup. Ct. 1934) (private school for boys aged ten to fifteen); *Dwight Sch. of Englewood v. State Bd. of Tax Appeals*, 114 *N.J.L.* 594, 596 (Sup. Ct. 1935) (private school for girls), *aff'd*, 117 N.J.L. 113 (E. & A. 1936); *West Orange Tp. v. Joseph Kushner Hebrew Academy*, 15 *N.J. Tax* 48 (Tax Ct. 1993) (private nursery school); *Buxton Country Day Sch. v. Township of Millburn*, 18 *N.J. Misc.* 443, 447 (Bd. of Tax Appeals 1940) (private elementary school). Indeed, the parties have not cited a case in New Jersey that applies the school exemption to any institution other than a primary or secondary school that teaches children in a traditional

manner, is accredited, and awards diplomas. The Fund, of course, does not teach children, is not a traditional school, is not accredited, and awards no degrees, although it is monitored by the U.S. Department of Labor and awards certificates upon completion of the coursework.

The Fund cites *Township Committee of Denville v. Board of Education of Vocational Schools in the County of Morris*, 59 *N.J.* 143 (1971), as support for its position that its training facility should be tax-exempt. In *Denville*, the sole question was whether the zoning ordinance of Denville barred the county vocational school. The school provided "vocational training classes for high school students during the day with adults and veterans attending evening classes five nights a week." *Id.* at 145. The board of vocational education alleged that the motive behind the exclusion was a desire to avoid the loss of taxes from the parcel of land used for the school. *Id.* at 150. As *dicta*, the Court stated, "Educational institutions, such as public vocational schools, are tax free as a matter of paramount State policy. . . ." *Ibid.* The Fund contends that that statement indicates that vocational schools, such as its own, are tax-free under *N.J.S.A.* 54:4-3.6. *Accord In re Bd. of Coop. Educ. Servs. of Nassau County v. Gaynor*, 306 *N.Y.S.*2d 216, 218 (App. Div. 1969) (stating public vocational school exempt from taxes), *appeal denied*, 310 *N.Y.S.*2d 1025 (N.Y. 1970). However, the school in *Denville* was a public high school that provided training for high-school students and night-time education for adults. The Court's statement that the school was tax-exempt followed from its status as a public high school, its "broad educational purpose . . . and [its] relation to conventional elementary and high schools. . . ." *Township Committee of Denville, supra*, 59 *N.J.* at 149.

Although there is no New Jersey case defining "school" in the context of section 3.6, a few cases have defined "college" for purposes of that section. In *Township of Princeton v. Institute for Advanced Study*, 59 *N.J. Super.* 46 (App. Div. 1960), the Institute for Advanced Study (Institute) sought a property-tax exemption as a "college." The Institute was a nonprofit corporation that conducted seminars for and provided research access for postdoctoral students. *Id.* at 49-51. Because all the members had doctorates, the Institute awarded no degrees. *Id.* at 51. Princeton claimed that this was not a college in the traditional sense. *Id.* at 52. The court rejected that claim:

> We are not persuaded that "college," as used in the statute, is to be confined to the kind of institution that has become so familiar to us, where there are teachers and pupils, courses of instruction, a conferring of degrees, and an extended discipline. The concept of a college is an organic one, taking on a varying aspect in different times and places.
>
> [*Ibid.*]

The court explained that "college" had different meanings in different historical periods, and that this institution of scholars and research fit into the broad definition of an institution of learning. *Id.* at 52-55.

The Fund argues that "school" should be given a similarly broad interpretation to reflect many different types of schools. We note that the holding in *Institute for Advanced Study* simply implies that the term "college" should not be interpreted solely to cover traditional

colleges; it does not suggest that every barber's college or art school is also a college, but rather that some nontraditional colleges will meet the definition of "college."

In *Textile Research Institute v. Township of Princeton*, 35 *N.J.* 218 (1961), we added the requirement to section 3.6 that the "college" not be primarily for the benefit of a specific for-profit sector of the economy. The Textile Research Institute (Textile Institute) was a non-profit organization in Princeton composed of company and personal members seeking a property-tax exemption. *Id.* at 219. All company members were involved in the textile business. *Ibid.* Company members elected thirty trustees to govern the Textile Institute. *Id.* at 219-20.

The Textile Institute had three major purposes: "[t]o provide instruction, to conduct research and to disseminate knowledge in the arts, sciences, technologies, and economics, particularly those relating to the field of textiles." *Id.* at 220. The Institute provided instruction by offering labs to predoctoral students at Princeton University and postdoctoral fellows. *Ibid.* Predoctoral students took courses at Princeton, but their doctoral theses were jointly supervised by Princeton faculty members and Textile Institute staff scientists. *Ibid.* Over half accepted jobs with company members upon graduation. *Ibid.*

The Textile Institute's research objective involved projects that were selected by member companies, and the results could be withheld from others for two years at member requests. *Id.* at 222. Finally, the Institute published two journals to disseminate information; one of

these journals was limited to members and provided advance information on new developments. *Ibid.*

The Institute sought an exemption, and the Court considered one issue: "whether the Textile Research Institute is a 'college' within the meaning of [*N.J.S.A.* 54:4-3.6]?" *Id.* at 219. The Court was not considering the "for-profit" prong of the test, but merely the statutory definition of "college." While conceding that "college" was given a broad definition in *Institute for Advanced Study*, *supra*, 59 *N.J. Super.* 46, the Court refused to view this particular institute as a college. *Id.* at 223. The Court stated:

> But the word "college" does not embrace an organization which is controlled by a particular profit-making segment of society and which is devoted principally and primarily to research for the benefit of that industry. The power of member companies to elect the board of trustees and to vote at business meetings, and company participation in various advisory committees, result in control of policy and programming of the Textile Research Institute. The company members' privilege to consult with the Institute staff, their participation in group-supported special projects, the sponsorship of special projects by individual companies and their receipt of advanced and special information therefrom, their sponsorship of participating fellowships, their participation in Institute seminars and meetings, and the advantages of the *Notes on Research* lead to the inescapable conclusion that the Institute *is*

> *primarily designed to benefit the textile industry.*
>
> All these factors compel the view that the Textile Research Institute is not an institution of learning as traditionally understood, and therefore is not a "college" within the meaning of *N.J.S.A.* 54:4-3.6.
>
> [*Ibid.* (emphasis added).]

We had an opportunity to address the rationale of *Textile Research* in *Town of Bloomfield v. Academy of Medicine of New Jersey*, 47 *N.J.* 358 (1966). The two cases differ because in *Academy of Medicine*, the Academy sought its tax exemption for being "organized exclusively for the moral and mental improvement of men, women and children," and not for being a school. *Id.* at 360. The Academy was composed of doctors and dentists, but it allowed the public to use its library and to attend symposiums. *Id.* at 362-63. We granted the exemption and declined to follow our rationale in *Textile Research* because the Academy was a "nonprofit, altruistic, beneficent organization contributing to the general health and welfare of the community. It d[id] not compete with private enterprise *nor d[id] id primarily aid one segment of private enterprise*." *Id.* at 365 (emphasis added).

The Fund distinguishes *Textile Research*, arguing that the Textile Institute was excluded because it was not only controlled by a particular profit-making industry, but because it was devoted "principally and primarily to research for the benefit of that industry," whereas the Fund's focus is not on researching improved construction techniques but on the education of the students. The

Appellate Division agreed. *New Jersey Carpenters Apprentice Training and Educ. Fund, supra*, 284 *N.J. Super.* at 528. We disagree.

The Fund is more akin to the Textile Institute than to the Academy of Medicine. The fund is controlled by and operated primarily for the benefit of the construction industry. Students from outside the industry are educated in carpentry, and their education is intended to encourage them to join that industry, as was in the case in *Textile Research.*

III

In *Kimberly School, supra*, 2 *N.J.* at 37-38, we listed certain factors that are relevant in determining whether a school is conducted for profit. An examination of the second factor, the character and nature of the board membership, offers further support for the conclusion that the training center is operated predominantly by and for the benefit of the construction industry. *See Textile Research Institute, supra*, 35 *N.J.* at 223 ("Ownership is extremely relevant in determining the nature and function of the organization under scrutiny and is examined merely to reveal the use to which the property is being put.") (citations omitted).

Here, the Tax Court found that the Board was composed of "advocates in a segment of society that is profit-driven." Under the Trust, half of the trustees are appointed by the unions and half by the employers; each can be discharged at the will of the group that appointed that trustee. The Fund contends that the board's composition was not designed to benefit a for-profit group, but to balance the interests of two groups. Furthermore,

the Fund notes that each trustee has an independent fiduciary duty to promote the educational purposes of the school. *See Wolosoff v. CSI Liquidating Trust*, 205 *N.J. Super.* 349, 359-60 (App. Div. 1985) (holding that trustee's fiduciary duty exists independent of any clause in trust agreement).

However, the trustees are appointed by the construction industry — the employees and the Union. Although the Fund correctly asserts that it does not automatically follow that the trustees are advocates for either interest, the trustees serve at the will of these interests. The trustees are all controlled by the industry and their primary role is to benefit that industry by providing more skilled workers for the employers and more union members for the Union. Those facts support the finding that the training center is operated primarily for the benefit of the unions and companies in the construction industry rather than for the public.

Additional support for that conclusion is that the revenues are not related to the cost of providing an education for the apprentices. *See Kimberly Sch.*, *supra*, 2 *N.J.* at 38. The revenues generated are based on a percentage of Union employees' wages. That source of revenue has resulted in the Fund having assets of $9,684,000, $5,000,000 of which is in cash and marketable securities. The Fund asserts that those assets do not alter its status because they cannot be distributed to the Union or the employers.

However, the Trust provides that if the Fund terminates, "no part of the corpus or income of this Fund shall be used for or diverted to purposes other than Apprentice Training and Educational purposes." To

distribute the Fund's assets for the educational use of any other industry would therefore be inconsistent with the Fund's stated purpose and would be unfair to those Union members who helped create the surplus. Thus, that factor also indicates that the Fund primarily benefits the construction industry; i.e., the employers, the Union, and the employees.

IV

Many states have denied real-estate exemptions to schools that do not provide traditional types of education and that primarily benefit a particular occupation, profession, or group rather than the public. *See, e.g.*, *Alcoser v. County of San Diego*, 169 *Cal. Rptr.* 91, 92-93 (Cal. Ct. App. 1980) (denying exemption to construction trade school because "Trust was primarily intended to and did benefit its union and employer parties and not the community in general[,]" despite evidence that community received indirect benefit); *California College of Mortuary Science v. County of Los Angeles*, 100 *Cal. Rptr.* 558, 560 (Cal. Ct. App. 1972) (denying exemption to vocational school in mortuary sciences because it did "not benefit primarily the community as a whole . . ., but benefits instead primarily a definite segment thereof, namely, the funeral service industry by providing for it competently trained personnel[]"); *Milward v. Paschen*, 157 *N.E.*2d 1, 6 (Ill. 1959) (denying tax exemption to foundation that "serve[d] mortuary profession[] and [was] designated to bring greater commercial success to that profession[]"); *Winona Sch. v. Department of Revenue*, 570 *N.E.*2d 523 (Ill. App. Ct. 1991) (denying real-estate tax exemption to operator of private photography school because it did not meet definition of school), *cert. denied*, 580 *N.E.*2d 137 (Ill. 1991); *American Ass'n of Cereal Chemists v. County*

of Dakota, 454 *N.W.*2d 912, 915-16 (Minn. 1990) (holding American Association of Cereal Chemists and American Phytopathological Society was not entitled to real estate tax exemption as "seminaries of learning" even though their primary purpose was educational because the "offerings [were] restricted to the limited area the organizations promote[]"); *Nebraska State Bar Found. v. Lancaster County Bd. of Equalization*, 465 *N.W.*2d 111, 121 (Neb. 1991) (denying property-tax exemption to Bar Foundation because it had not shown that it "[was] an institution with the primary or predominant activity of offering regular courses with systematic instruction in academic, vocational, or technical subjects"); *PICPA Found. for Educ. & Research v. Commonwealth*, 598 *A.*2d 1078, 1082, 1083 (Pa. Cmmw. Ct. 1991) (holding that petitioner was not entitled to refund as nonprofit educational institution because it operated "primarily and predominantly to benefit individuals who have a professional or occupational interest in accounting subjects" and only conferred "an indirect benefit to the public in general"), *aff'd*, 634 *A.*2d 187 (Pa. 1993); *Ski-Lan Gymnastics & Performing Arts Educ. Found., Inc. v. City of Rutland*, 465 *A.*2d 1363, 1365 (Vt. 1983) (denying exemption to nonprofit school for gymnastics and performing arts because it provided "an essentially private benefit to a limited class of persons[]"); *Engineers and Scientists of Milwaukee, Inc. v. City of Milwaukee*, 157 *N.W.*2d 572, 578 (Wis. 1968) (holding property for continuing education and professional advancement of engineers and scientists was not within legislature's intent when it exempted property for educational associations).

Other states have adopted an intermediate approach, exempting nontraditional schools on a case-by-case basis. Those jurisdictions recognize that "[t]he more

remote the objects and methods become from the traditionally recognized objects and methods the more care must be taken to preserve sound principles and to avoid unwarranted exemptions from the burdens of government." *Cummington Sch. of the Arts, Inc. v. Board of Assessors of Cummington*, 369 *N.E.*2d 457, 462 (Mass. 1977) (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 54 *N.E.*2d 199, 202 (Mass. 1944)). Similarly, the New Hampshire Supreme Court stated:

> After careful considerations and a review of standards used by other jurisdictions, however, we are convinced that the construction of a bright-line test is impossible; each case will necessarily depend on its own peculiar facts. . . . Fourth, although it is not necessary that the training be of the type that would otherwise be furnished by the government, the task of the taxpayer to prove that he falls within the exemption will be more difficult as the divergence from traditional educational methods and objectives increases.
>
> [*New Canaan Academy, Inc. v. Town of Canaan*, 441 *A.*2d 1174, 1176 (N.H. 1982) (citations omitted).]

The case-by-case approach has the advantage of preventing a flood of new exemptions for art schools and the like although preserving some flexibility in the statutes to recognize new types of educational institutions. On the other hand, it does not provide a standard for courts to follow and ensures that every nontraditional school will litigate its exemption status.

Other states have adopted an even less restrictive definition of schools. In most of those jurisdictions, however, the inquiry focuses on whether the institution serves "an educational purpose." *See, e.g.*, *McKee v. Evans*, 490 *P.*2d 1226, 1230-31 (Alaska 1971) (granting exemption to Apprentice and Manpower Training Trust's nonprofit educational school because "educational purposes" were defined to "include[] systematic instruction in any and all branches of learning from which a substantial public benefit is derived"); *see also J.A.T.T. Title Holding Corp. v. Roberts*, 371 *S.E.*2d 861, 862 (Ga. 1988) (holding trade school operated by union trust was "seminary of learning"); *Smith v. Feather*, 234 *S.W.*2d 418, 421 (Tex. 1950) (allowing exemption under statute that allowed buildings "used exclusively . . . for school purposes" to school offering design and interior decorating courses because school had three-year course of study, awarded diplomas upon completion, and was approved by Veterans Administration and State of Texas).

The Internal Revenue Service also has adopted a broad definition of "educational" institutions in *I.R.C.* §501(c)(3), which provides an exemption to "corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes." It includes "'schools' as one might colloquially think of them: institutions with a regularly scheduled curriculum . . . including primary and secondary school[s], colleges, professional schools, and trade schools." Colombo, *supra*, 35 *Ariz. L. Rev.* at 847. However, it also extends the exemption to any organization providing instruction to the public "on subjects useful to the individual and beneficial to the community," including jazz festivals and university bookstores. *Ibid.* (citations omitted). Of course, a property owner's exemption from federal income taxation

does not determine whether the owner's property is tax-exempt under state real-estate law. *New Canaan Academy, Inc. v. Town of Canaan*, *supra*, 441 *A.*2d at 1176.

V

The exemption laws are strictly construed against the taxpayer, and the taxpayer bears the burden of proving the exemption. All debatable issues are resolved in favor of the taxing municipality. Although a close case, the Fund has not convinced the Court that the statutory exemption for "school" was intended to cover its training facility. The plain meaning of the statute and prior case law supports that conclusion.

To adopt the broad definition for "school" would be tantamount to reading colleges, academies, and seminaries out of the statute. We are reluctant to interpret "school" in a way that makes those other words superfluous. Moreover, although the Fund serves an educational purpose in training the apprentices to become skilled carpenters, the Fund is not a traditional school and does not benefit our society in the way the Legislature contemplated when it enacted section 3.6. "Undeniably[,] it is the public benefit resulting from education that justifies granting schools and colleges exemption from taxation, but such benefit cannot be exactly admeasured either on the part of the schools or of the public." *Kimberly Sch.*, *supra*, 2 *N.J.* at 42. Here, the Fund's primary purpose is to benefit the construction industry, i.e., its employers and its employees.

Thus, we conclude that the training facility is not a school. *Textile Research*, *supra*, 35 *N.J.* 218, precludes an

exemption in this case because the Fund was operated primarily to benefit a particular profit-making sector of the economy in the same sense as the Textile Institute in that case. If this Fund is granted an exemption, then other "institutions of learning" that predominantly benefit one profit-making segment will claim exemptions. That will have an adverse impact on municipal tax bases. The statute is to be strictly construed against the taxpayer. Absent a more compelling legislative message of intent, we cannot condone the grant of tax-exempt status.

The judgment of the Appellate Division is reversed.

CHIEF JUSTICE PORITZ and JUSTICES HANDLER, POLLOCK, O'HERN, STEIN and COLEMAN join in JUSTICE GARIBALDI's opinion.

SUPREME COURT OF NEW JERSEY

NO. A-12 SEPTEMBER TERM 1996

ON APPEAL FROM _____
ON CERTIFICATION TO Appellate Division,
Superior Court

NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND,

Plaintiff-Respondent,

v.

BOROUGH OF KENILWORTH, NEW JERSEY,

Defendant-Appellant.

DECIDED December 17, 1996
Chief Justice Poritz PRESIDING
OPINION BY Justice Garibaldi
CONCURRING OPINION BY _____
DISSENTING OPINION BY _____

CHECKLIST	Reversed		
CHIEF JUSTICE PORITZ	X		
JUSTICE HANDLER	X		
JUSTICE POLLOCK	X		
JUSTICE O'HERN	X		
JUSTICE GARIBALDI	X		
JUSTICE STEIN	X		
JUSTICE COLEMAN	X		
TOTALS	7		

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-456-94T5

APPROVED FOR PUBLICATION
OCT 16 1995
APPELLATE DIVISION

FILING DATE
APPELLATE DIVISION
OCT 16 1995
/s/
Clerk

NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND,

Plaintiff-Appellant,

v.

BOROUGH OF KENILWORTH, NEW JERSEY,

Defendant-Respondent.

Submitted: September 12, 1995
Decided: OCT 16 1995

Before Judges Pressler, Wefing and Rodríguez.

On appeal from the Tax Court of New Jersey.

Oransky, Scaraggi, Borg & Abbamonte, attorneys for appellant (Andrew D. Borg, on the brief).

Palumbo & Renaud, attorneys for respondent (Robert F. Renaud, on the brief).

The opinion of the court was delivered by

WEFING, J.A.D.

The plaintiff, the New Jersey Carpenters Apprentice Training and Education Fund (Fund), appeals from an Order of the Tax Court entered September 29, 1994 that affirmed the real estate tax assessment for property in Kenilworth owned by the Fund.

The Fund was created under a deed of trust dated November 1, 1969 between the New Jersey State Council of Carpenters, an unincorporated association of trade union and district councils affiliated with the United Brotherhood of Carpenters and Joiners of America, and the Building Contractors Association of New Jersey, an association of employers in the building construction industry.

The trust is managed by a board of trustees, whose membership is composed equally of representatives from labor and from management. The purpose of the trust is to provide free instruction and training to individuals who are working as apprentices and wish to become journeymen carpenters. It provides one hundred sixty hours of instruction in various aspects of the carpentry trade over a four-year period. When a student completes the program, the student receives a journeyman's certificate from the United States Department of Labor and the Union. There is no requirement that students be union members or related to union members although it is expected that those who complete the program will become union members.

The program has no restrictions in terms of race, color or sex. Students are recruited from the public at large; they are required only to have either a high school diploma or an equivalency degree.

The program itself is funded primarily through wage deductions. An employer is required, under collective bargaining agreements, to deduct one percent of a union employee's wages and forward that to the Fund. The Fund thus has two sources of income: the funds generated through payroll deductions and any interest income it may generate. The Fund itself is exempt from the payment of federal income tax under § 501 of the Internal Revenue Code.

In April 1990, the Fund purchased property located at 221 South 31st Street in Kenilworth to house its training programs for the northern part of the State. It also operates an instructional training program in Vineland for individuals in the southern part of the State. The Kenilworth premises are used only for the instruction and training programs; no other activities are conducted there. Prior to purchasing the Kenilworth property, the Fund conducted its programs in the evening using the facilities of the Middlesex County vocational schools.

The Fund applied to the tax assessor of Kenilworth for an exemption from real property taxes pursuant to *N.J.S.A.* 54:4-3.6. When that was denied, the Fund appealed to the Union County Board of Taxation which upheld the assessor. It then filed a complaint with the Tax Court seeking a declaration that its property was exempt from real estate taxes. The Tax Court denied the exemption as well and affirmed the local property tax

assessment. Plaintiff has appealed to this court and we reverse.

N.J.S.A. 54:4-3.6 exempts from real estate taxation "all buildings actually used for colleges, schools, academies or seminaries . . . or the lands on which they stand." In its oral opinion, the Tax Court noted several factors to support its conclusion that the apprentice training program in Kenilworth did not qualify for tax exemption as a school. It noted that the trust instrument itself was revocable and that it was not free from self-interest since it was designed to provide workers for the building contractors and members for the union. This, it concluded, represented benefits flowing "to a profit-making segment of society." It concluded there was a lack of public benefit that a governmental entity would otherwise have had to provide.

In addition, the Tax Court was clearly troubled by the net assets of the Fund shown on the Fund's 1991 Form 990 ($9,331,441) and by the amount of the salaries of the administrative and instructional staff. It was also dissatisfied with the provisions within the trust instrument for disbursement of trust funds in the event of dissolution.

In reaching its conclusion about a lack of public benefit, the Tax Court judge relied upon *Kimberly Sch. v. Town of Montclair*, 2 *N.J.* 28 (1949). We are satisfied that that case does not lead to the conclusion that plaintiff's property should be subject to real estate taxation.

We recognize, of course, that *N.J.S.A.* 54:4-3.6 should be strictly construed, for the effect of granting an exemption from property taxes is merely to shift the tax burden onto remaining taxpayers. *West Orange Tp. v.*

Joseph Kushner Hebrew Academy, 13 *N.J. Tax* 48, 52 (1993). We further recognize as settled that the entity claiming the exemption has the burden of proving it is entitled to it. *Presbyterian Homes v. Division of Tax Appeals*, 55 *N.J.* 275, 283 (1970).

One of the theoretical underpinnings of real property tax exemptions is referred to as the doctrine of *quid pro quo*. It has been set forth in the following manner:

> Exemptions from the burdens of taxation, which the great masses of the people are called upon to sustain, as a requisite of civil government, are only favored in legislation, upon the theory that the concession is due as *quid pro quo* for the performance of a service essentially public, and which the state thereby is relieved *pro tanto* from the necessity of performing, such as works of charity and education, freely and charitably bestowed, as evidenced by the legislation under consideration. Without that concurring prerequisite, an exemption becomes essentially a gift of public funds at the expense of the taxpayer, and indefensible both under our public policy of equal taxation and our constitutional safeguard against illegal taxation.
>
> [*Carteret Academy v. State Board*, 102 *N.J.L.* 525, 528-529 (Sup. Ct. 1926), *aff'd o.b.* 104 *N.J.L.* 165 (E. & A. 1927).]

It was to this principle of *quid pro quo* that the Tax Court was referring when it determined that the Fund was not providing a public benefit that a governmental entity would otherwise have had to supply.

The limitations on this principle, however, were clearly set forth by Chief Justice Vanderbilt in *Kimberly School v. Town of Montclair*, where he wrote:

> The term *quid pro quo* implies a quantitative exactness that cannot possibly be applied in measuring the benefits to the public from the existence of educational institutions. It erroneously suggests that the benefit is confined to the municipality in which the school is located, whereas in fact the advantages of educational institutions are not confined to the respective localities in which they are situated. Undeniably it is the public benefit resulting from education that justifies granting schools and colleges exemption from taxation, but such benefit cannot be exactly admeasured either on the part of the schools or of the public.
>
> [*Kimberly, supra*, 2 *N.J.* at 42.]

We think it is beyond doubt that the public benefits by the training programs provided by the Fund. It is clearly to the benefit of the public to have a pool of skilled, well-trained carpenters available. Our Legislature has long recognized the benefits that flow to the public from providing adequate vocational training. See, e.g., *N.J.S.A.* 18A:54-1 *et seq.*; *N.J.S.A.* 34:1A-36 *et seq.*

The training and the courses provided by the Fund are available without cost to the students, who numbered more than 600 in 1994. These students, most of whom are working as apprentices, pay nothing for books, enrollment, registration, materials or supplies. Everything is free to them. Students are graded upon their work and if it is unsatisfactory, they do not progress and do not receive the certificate of completion. That the training program may also supply contractors with employees and the union with members is, to our mind, ancillary to the even greater public benefit of providing training in a skilled trade to those who seek it.

A school includes "an institution for instruction in a particular skill or field." *Random House Unabridged Dictionary* 1715 (2nd ed., 1993). We are satisfied that the instructional training program for journeymen carpenters conducted by the Fund qualifies as a school.

The Tax Court was clearly troubled by the salary levels of the administrative and instructional staff. The testimony was unrefuted, however, that the salaries were based on union pay scales. It is unrealistic to expect that individuals would be willing to serve in these positions if it meant a significant reduction in what they could otherwise earn.

The Tax Court was also bothered by the size of the Fund's net assets. It concluded that the fact that payments to the Fund were based on wages, rather than on actual expenses, demonstrated the Fund was intended to make money.

The income of the Fund, however, fluctuates with economic conditions. When the economy deteriorates,

fewer carpentry jobs are available and the amount paid to the Fund decreases. We are unable to conclude the Fund's assets are so disproportionate that it should lose a tax exemption on that basis.

In *Kimberly School v. Town of Montclair*, Justice Vanderbilt said, "Our sole function is to determine on all the facts, present and past, whether the school in question was being run for the purpose of making money." *Kimberly, supra*, 2 *N.J.* at 43. We are satisfied that on the record presented here, the answer to that question is no.

The Tax Court also considered the operation of this training program analogous to that run by the Textile Research Institute in conjunction with Princeton University, which was denied a real property tax exemption in Textile Research Inst. v. Princeton Tp., 35 *N.J.* 218 (1961). Again, we disagree.

The Textile Research Institute was a non-profit corporation; its members were companies "engaged in the production or utilization of textiles, textile supplies, textile raw materials, textile products, textile machinery or equipment, or engaged in the utilization, manipulation of chemical or physical treatment of fibers, or engaged in research or education related to these fields." *Textile Research Inst. v. Princeton Tp., supra*, 35 *N.J.* at 219. Individuals could also become members of the Institute but had no voting privileges. The Institute was governed by a board of trustees who were elected solely by the member companies. It offered fellowships and laboratory facilities to pre-doctoral and post-doctoral students in the textile field through a cooperative arrangement with Princeton University. Pre-doctoral students registered as graduate students at Princeton University. While they

took their course work at the University, they conducted their thesis research in the Institute laboratories, supervised by Institute scientists as well as Princeton faculty. Upon completion, they received both a degree from Princeton University and a certificate from the Institute.

The Institute also afforded facilities for post-doctoral fellows to conduct research. In such a situation, member companies, who supported the research, could specify its subject. The Institute also conducted research by its own staff in areas in which the member companies were interested. The Institute also published the results of its research. Some of the publications were available to the general public and some only to member companies for an initial period of time. In the case of research supported by one member company, the results would be withheld from other members for two years.

After reviewing these factors, the Supreme Court concluded that they "lead to the inescapable conclusion that the Institute is primarily designed to benefit the textile industry." The court thus held that the Institute was not a college for purposes of *N.J.S.A.* 54:4-3.6 and was thus subject to real estate taxation.

In this case, the benefits of the vocational training provided by the Fund extend far beyond the union and the employer. The purpose of the Fund is not to develop newer, more efficient and economic ways to construct a building; it is rather to provide the basic instruction and methodology to allow individuals to pursue a trade when they might not otherwise have the opportunity to do.

Finally, the Tax Court judge relied upon the revocable nature of the Trust Agreement that established the Fund; indeed, she called it "essential" to her decision. Within her oral opinion, she referred to a "lack of certainty that the assets will not pass out to individuals, pass out to (a) profit-making segment of society."

The original deed of Trust, executed in 1969 dealt at several points with the possibility that the Fund might terminate. Section 6 of Article II of the Trust Agreement provided:

> The Trustees shall use and apply the property and assets of the Fund only for the following purposes and under no circumstances shall any moneys or assets of the Fund be payable or revert to the Employers or to the Union.
>
> a) To pay or provide for the payment of all reasonable and necessary expenses of collecting the Fund Payments and administering the affairs of the Fund, including, but without limitation, all reasonable expenses which may be incurred in connection with the establishment and maintenance of the Fund, the employment of such administrative, legal, expert and clerical assistance, the leasing or purchase of such premises and of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate in the performance of their duties.

b) To pay or provide for the payment of Apprentice Training and Educational benefits as may be legal for such Funds and as limited by this Agreement and by the Internal Revenue Code for such exempt trusts.

Section 2 of Article VII provided:

In the event of termination of the Fund, the Trustees shall apply the Fund to pay or to provide for the payment of any and all obligations of the said Fund and distribute any remaining assets in such manner or will, in their opinion, best effectuate the purposes of this Fund, provided however, that no part of the corpus or income of this Fund shall be used for or diverted to purposes other than Apprentice Training and Educational purposes or set forth in this Agreement or the administrative expenses of this Fund. Under no circumstances shall any of said corpus or income revert to any Employer or Union.

Finally, Section 4 of Article VIII provided:

Anything contained in this Agreement, or any amendment hereof to the contrary notwithstanding, no part of the corpus or income of the Fund shall be used for, or diverted to, purposes other than Apprentice Training and Educational, (sic) limited however, to the purposes provided for in this Agreement, or the liabilities, including

taxes, of the Fund. No part of said corpus or income shall be paid to or revert to any Employer or the Union.

The Trust Agreement has been amended several times; one of the amendments, effective January 1, 1975, followed passage of the Federal Employee Retirement Income Security Act of 1974 (ERISA). Section 9 of that Amendment stated in part "All provisions of the Agreement which are in conflict with the Employee Retirement Income Security Act of 1974 are deleted." Although the transcript is not at all clear, we gather that the Tax Court judge was of the view that this 1975 amendment removed the provisions of the Agreement that would otherwise have prevented distribution of the Fund's assets to the union or employers. We do not consider that general amending language sufficient to deny a property tax exemption to the Fund.

The judgment is reversed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/

Clerk

ORDER AFFIRMING ASSESSMENT ENTERED
SEPTEMBER 29, 1994

ADVANCE
PREPARED BY LUTZ
APPELLATE PRINTERS

TAX COURT OF NEW JERSEY
DOCKET NO. 010953-92

New Jersey Carpenters Apprentice Training and Education Fund,	:	
Plaintiff(s),	:	
	:	CIVIL ACTION
v.	:	JUDGMENT
Kenilworth Borough (Union County),	:	
Defendant(s).	:	

The matter having been heard and the Court having considered the evidence and argument by or on behalf of the parties, the assessment is affirmed.

Block	178
Lot	5
Street Address	221 South 31st Street
Year(s)	1992

/s/ Maureen Dougherty
Maureen Dougherty, Judge
Tax Court of New Jersey

Entered: */s/ September 29, 1994*$_{MD}$

Attorney for Plaintiff(s): Andrew D. Borg, Esq.
Attorney for Defendant(s): Robert F. Renaud, Esq.

ADVANCE
PREPARED BY LUTZ
APPELLATE PRINTERS

TRUE COPY

TRANSCRIPT OF TRIAL DATED
SEPTEMBER 23, 1993

TAX COURT
MORRIS COUNTY, NEW JERSEY
DOCKET NO. 010953-92

NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND	)	
vs.	)	TRANSCRIPT OF TRIAL
KENILWORTH BOROUGH	)	
Defendant.	)	

Place: Tax Court
60 Washington Street
Morristown, NJ 07960

Date: September 23, 1994

BEFORE:

HON. MAUREEN DOUGHERTY, JTC

TRANSCRIPT ORDERED BY:

Andrew Borg (Oransky, Scaraggi, Borg & Abbamonte)

APPEARANCES:

ANDREW BORG (Oransky, Scaraggi, Borg & Abbamonte)
Attorney for the Plaintiff.

ROBERT F. RENAUD (Palumbo & Renaud)
Attorney for the Defendant.

Karen Antero
309 Dawson Avenue
Boonton, New Jersey

THE COURT: Good morning, counsel.

MR. RENAUD: Good morning, Judge.

MR. BORG: Good morning, Judge.

THE COURT: I have you on—on the speakerphone.

MR. RENAUD: Yes.

THE COURT: And I assume that you won't have an objection.

MR. RENAUD: No. Certainly not.

THE COURT: Thank you. All right. We're—we're here today on the matter entitled New Jersey Carpenter's Apprentice Training Program—Training and Education Fund, excuse me, versus Borough of

Kenilworth, docket number 010953-92. May we have your appearances, please?

MR. BORG: Judge, this is Andrew Borg. I'm the attorney for the educational fund.

MR. RENAUD: Robert F. Renaud of Palumbo and Renaud on behalf of the defendant, the Borough of Kenilworth.

THE COURT: All right. Mr. Borg, I—I did not hear anything other than your name, and I'm not sure whether—whether you and I have a bad connection. Can you hear me?

MR. BORG: Yes, your Honor.

THE COURT: All right. Becomes sometimes when we have 3 way—3 party conference calls one party's connection to this phone is not clear. So in the event that you are having difficulty hearing me, please speak up.

MR. BORG: You're coming across fine.

THE COURT: Very good. All right. Now, this was an appeal with respect to tax year 1992 of the assessment for taxpayer's property located at 721 South 31st Street in the Borough of Kenilworth and indicated on the municipality's tax map as block 178 lot 5. The assessment being appealed from was as follows. Land, $726,000, improvement, $1,981,500, for a total assessment of $2,707,500. Now, we are affirming the assessment for the reasons which follow.

MR. BORG: Are you creating a record of this that we're

THE COURT: Yes. This is being recorded.

MR. BORG: And we're going to get a copy of this?

THE COURT: Yes. You certainly may. All right. The taxpayer is a trust formed by a written agreement and declaration of trust dated as of November 1, 1969. The trust agreement was made among the following. The—the first category of parties to the trust agreement we'll refer to variously as at various points in the opinion as the union parties. And those parties consist of the New Jersey State Counsel of Carpenters, which is an unincorporated association of trade union and district counsel's affiliated with the United Brotherhood of Carpenters and Joiners of America. Now, they entered into the agreement the identity acting for first and the trust agreement does also refer to this—this collection, this association, of unions and counsels as the union. Secondly, we have an employer category and—and that is the Building Contractors Association of New Jersey which is an association of employers in the building construction industry. And—and thirdly, we have a—a category which also is included in the employers which consists of such additional employers who are under—under an obligation to make contributions to the fund by virtue of their respective collective bargaining agreements with the union. And finally, the final parties to the—the agreement establishing the trust are the trustees. And the trustees consist of representatives from the union and the employers. All right. Now, the fund is said and—and the references here are to the agreement and declaration of trust creating and establishing the New Jersey Carpenters

Apprentice Training and Education Fund which was marked as exhibit P-1 at—at trial of this matter. The trust is comprised—the assets or the trust corpus is comprised of the entire assets initially derived from fund payments required by the provisions of various collective bargaining—bargaining agreements to be made by employers pursuant to such agreements to trust. The trustees are directed under the trust to hold the funds pursuant to the terms of the agreement. Article 2, section 4 indicates that the—the purpose for which the—the fund is established is for apprentice training and educational purposes. The purpose is more clearly set out in section 6 of—of article 2, paragraph A and B and the—the purposes there set out are to in paragraph A, A or provide for the payment of all reasonable and necessary expenses of collecting the fund payment and administering the affairs of the fund, is—is that—excuse me, counsel. Is—Mr. Borg,

MR. BORG: Yes.

THE COURT: Mr. Borg

MR. BORG: Yes.

THE COURT: Would—there appear to be additional noise.

MR. BORG: No. That's not from here, your Honor.

THE COURT: Mr. Renaud

MR. RENAUD: I think it was on my speaker. I just took it off. I put off the speaker.

THE COURT: Thank you.

MR. RENAUD: That's OK. I'm not in my office unfortunately, so I lost control of

THE COURT: The situation

MR. RENAUD: the location, so I—it's off the speaker.

THE COURT: Well, I—I think that's wise. Section 6, paragraph A,

to pay or provide for the payment of all reasonable and necessary expenses of collecting the fund payment and administering the affairs of the fund including but without limitation all reasonable expenses which may be incurred in connection with the establishment and maintenance of the fund, et cetera. Now, that quote is from article 2, section A, paragraph A, page 5. Now, on that same page on that same article, that same section, paragraph B provides

a secondary purpose is to pay or provide for the payment of apprentice training and educational benefits as may be legal for such fund and as limited by this agreement and by the internal revenue code for such exempt trust.

All right. Article 3 at page 6 includes provisions whereby the—the trustees under the fund will be appointed 50 percent from the union group and 50 percent from the employer group. Now, over the years through various amendments which are annexed to exhibit P-1 the number of trustees which was additionally 14 in total was

expanded so that now it is 24 in total. Page 17 of the trust, article 7, section 1 provides that the trust may be terminated when there is no longer, and I'm quoting here section 1.

The fund may be terminated when there is no longer in force a collective bargaining agreement between a single employer and the union requiring fund payment to the fund.

The quote continues.

Furthermore, the fund shall terminate on January 1, 1990 but shall be automatically renewable for 21 year periods thereafter unless a majority of the employers or the union serve written notice to the contrary on the other party at least 60 days prior to the termination date.

End quote. Section 2 continues. And, again, I am reading from the document so we would—this is a direct quote.

In the event of the termination of the fund the trustees shall apply the fund to pay or to provide for the payment of any and all obligation of the said fund and distribute any remaining assets in such manner as will. And—and the document provides in such manner or will I am making that adjustment in their opinion best affectuate the purposes of this fund provided, however, that no part of the corpus or income of the fund shall be used for or diverted to purposes other than apprentice, training and educational purposes or (sic) as set forth in this agreement or the administrative expenses of this fund. Under no circumstances shall any of said corpus or income revert to any employer or union.

Article 9 at page 21 of the trust provides that the—the trust may be amended. It is a—a revocable trust. And article 9 section 1 provides that it may be amended at any time by the two-thirds vote in writing of the trustee. It further provides

No amendment shall divert the funds then constituted or any part thereof to a purpose other than as set forth in this agreement nor permit a return or payment of the assets to the employer . . .

Article 8 section 4 at page 19 provides in part

Anything contained in this agreement or any amendment hereof to the contrary notwithstanding no part of the corpus or income of the fund shall be used for or diverted to purposes other than apprentice training and education, educational limited, however, to the purposes provided for in this agreement or the liabilities including taxes of the fund. No part of said corpus or income shall be paid through or revert to any employer or the union.

Now, amendment 4 to this trust agreement became effective on January 1, 1975 and the—the premise upon which the amendment is based set out at the beginning of the written document of amendment is as follows.

Whereas by virtue of the employee retirement income security act of 1974 it is adviseable to amend the agreement and declaration of trust (agreement) governing the New Jersey Carpenter's Apprentice Training and Educational Fund (funds) so as to set forth the manner that the board of trustees (board) shall supervise the operation of the fund . . .

The—the amendment goes on to set out various provisions which govern the administration of the fund, the meetings of the board of directors and the interaction of the fund with other affiliated fringe benefit funds which are not specifically identified. In particular, at page 3, paragraph 4(e) the document provides that the board, and in particular, the administrative manager who is to be appointed as a result of this amendment shall receive application

from affilated groups for assistance in its education and apprentice training endeavors; to process such application in accordance with the procedure, standards and rules established by the board. At page 6, paragraph 7 the amendment provides that the board shall appoint one or more investment managers with those managers having power to acquire and dispose of assets under the control of such investment managers. And those investment managers being directed to

manage the assets with the care, (indiscernible - beep in background), prudence and diligence under the circumstances then prevailing. That a prudent person acting in like capacity and familiar with—with such matters would use in the management of such investment.

On page 6 of amendment number 4 at paragraph 9 the—the following provision is included.

All provisions of the agreement which are in conflict with the employee retirement income security act of 1974 are deleted.

All right. Now, the—the subject property was acquired by purchase on April 11, 1990 at a purchase price of

$2,800,000. Plaintiff made application for exemption in July of 1991 pursuant to the provisions of NJSA 54:4-4.4. This application for exemption was denied by the municipal assessor. Thereafter on March 18, 1992 plaintiff appealed the denial of exemption to the County Board. The County Board affirmed the assessment without hearing on July 15, 1992 and thereafter appeal to the Tax Court was made. Now, the evidence at trial was that the training program which is conducted at the subject premise is—is a program whereby apprentice carpenters undertake completion of a certain required curriculum to attain the status of journeymen carpenters within the—the various unions within the State of New Jersey. The—the training program consists of 4 years, a—a 4 year period, of on-site training. And in that 4 year period the—the individual apprentices spend 1 week, and 1 week being 5 days, of every 13 weeks at the subject property participating in the various training activity. In addition, the requirements to attain the status of journeymen carpenter include 640 hours of off-site training. Now, the—the evidence was, and the testimony of—of plaintiff's witness at trial was the—the—the curriculum consists of 8 skilled areas and apprentices appear at the training center in their work clothes with their tools and they undertake to proceed through the—the steps necessary to master each of the 8 skilled areas to attain the journeymen status. Each skill area contains specific tasks which make up the criteria for completing the—the study of that area. Now, the testimony was that the apprentice observes a slide presentation on the specific task when the apprentice feels confident that he or she can proceed to work in that skill area and work on those specific tasks the apprentice undertakes to physically complete a—a hands-on project. Instructors are available to answer questions to assigned projects to assist apprentices and to—to check and grade

on a pass/fail basis the—the—the individual's completion and performance. The evidence was that if apprentices do not attend and complete the program they will not obtain raises they may be "left back" and eventually terminated for cause. Students in the program come from career days which are conducted by the union at both the various union and—and subparts of the union at various local high schools, vocational schools and by the Department of Labor of the State of New Jersey. There are approximately 600 students during any year at the Kenilworth facility. The evidence was that—that "contributions" are made to the fund pursuant to collective bargaining agreement, that in general 1 percent of each employee's gross wages is dedicated to the apprentice training fund, that the 1 percent is paid by deduction from the employee's wages with respect to union carpenters. The students at the facility in Kenilworth pay no tuition, no books, no material costs. Absolutely nothing is paid by them to participate in the curriculum presented at that facility. Now, the—the form 990, federal form 990 which is an income tax return of an organization exempt from federal income tax, which was admitted in evidence for tax year 1991, indicated that the—the subject property was acquired at a—at a price of $2,800,000, that at some course in previous years a—an additional facility have been operated in southern New Jersey and new—a new building had been instructed in southern New Jersey for the—the purposes maintaining a similar program at a cost of $1,105,722, that improvements had been undertaken at the subject property totaling $735,922. Additionally, for calendar year 1991 the total revenue for taxpayer aggregated $2,734,418 and that this revenue, the source of this revenue, was basically two-fold contributions totalling $2,379,582 or said to have been received and investment income of $354,836 is indicated at line 4 of the form 990

to have been received from interest bearing investments. Now, at line 13 of form 990 the organization indicates that for tax year 1991 in that calendar year 1991 the program expenses incurred totalled $754,098. And at line 14 of that form 990 tax years return indicates management and general expenses of $1,285,063. Taxpayer's witness at trial indicated that for tax year 1991 the income, and—and by income we—we assume that the witness was referring to contribution, contributions made by the various employers by virtue of deduction from each employee's wages of the 1 percent pursuant to the collective bargaining agreement were off, so that for tax year 1991 the—the income was lower than—than perhaps it had been in previous years as a result of the slow down in the construction industry. However, that witness indicated that the—the cost to run the fund, to run the fund's education and training program, in tax year 1991 was representative of the cost in—in a normal year. Now, the cost to—to run that program, the program services as indicated on the return, constitute approximately 37 percent of taxpayer's total expenses for program services as well as administration and general management expenses. At the end of tax year 1991 form 990 at line 21 indicates taxpayer's net asset totalled $9,331,441. Taxpayer does not have any long-term debt and apparently construction and acquisition to property, the subject property included, was—were made without the need to undertake any financing. Part 4, schedule A to form 990 for 1991 shows—gives the contribution record from 1987 to 1990 and shows a—a high contribution receipt in 1990 of $2,550,483 and a low contribution receipt in 1987 of $1,468,503. Now, as part of the form 990 and as indicated by the municipality's counsel, both an argument and in cross examination of taxpayer's witness at trial part 5 to schedule A to form 990, I'm sorry, that's part 4, no, part 5.

So that it's at page 3 of schedule A. It is a—it's a questionnaire, and it's a questionnaire to be completed only by schools as—as it indicates in its directions, the checked box 6 on part 4 of schedule A. Now, part 4 of schedule A is—is contained at page 2. And it is—it's a requirement for completion for organizations which are not private foundation. And, accordingly, follow a different set of rules from organizations which are private foundation for federal income tax purposes. So in—in a sense it's an information for federal purposes. Now, one of the reasons in part 4 to schedule A at page 2 for not being a private foundation for federal income tax purposes is if the organization is a school and the reference to section 170(b)(1)(A)(2i) of the internal revenue code of 1986 is included. Now, at page 3 of schedule A part 5 a schedule is included for private schools who have checked box 6 as a reason for them failing to—to be classified as private foundations for internal revenue code purposes. And this is not completed and accordingly it—the—the information required is information required of—of private schools in order to—to qualify for the federal treatment which a taxpayer checking that box would have been looking for. All right. Now, NJSA 54:4-3.6 is the statute providing for exemptions for—for schools. And taxpayer said that—that it's a school and therefore is entitled to be exempt from real property tax. And the municipality has—has, of course, denied that—that argument has any validity and imposed the—the assessment which has been affirmed by the county board. The statute requires the following.

Actual use as a school by an association, corporation or institution not conducted for profit where the association, corporation or institution claiming the exemption owns the property is—is—and is authorized

under its organizational document to carry out the purposes on account of which the exemption is claimed.

We have basically 2 issues raised at trial. And the first is does—is—is the property, the subject property, actually used as a school as the statute requires, as—as a college, school, academy or seminary. Used the word school or—or college in a very general, generic, sense. Now, the second issue is is the trust an entity conducted for profit. Now, at times it's difficult to separate these 2 issues as they are—they are somewhat intertwined. But going to the first issue, what constitutes a school. The—the case which is most helpful in which we would find to be particularly convincing in the closest in—in factual underpinning was cited by the municipality, Textile Research Institute v. Princeton Township. And it is 218—35 in New Jersey 218 1961. Now, at page—pages 222 and 223 of the opinion, in—in this case we have a situation where we had an institute an institute which conducted research and study. It was an institute which had been formed and was administered by textile companies, companies which are involved in production, marketing and sale of textiles. And—and the companies established the textile institute and—and they were members of it. Now, this institute was seeking an exemption with respect to its real property located in the Township of Princeton. In—in affirming the denial of the exemption our support looked the issue of—of does this constitute a college activity which is conducted here. And it was—it focused on—on the make-up of the board of trustees as well as the benefit, the segment of society being benefitted by the undertakings of the institute in particular. Now, the—the institute's program and direction was controlled by a board of trustees, and the board of trustees was made up of members of a profit-making segment of

society. The Court found that the—the undertakings of the organization were devoted principally and primarily to research to the benefit of that segment of society, for the benefit of the—the companies whose—whose representatives served on the board of trustees and the companies who were members of the institute. And, accordingly, the—the Court affirmed the denial of the—the exemption. The situation before us consists of a trust. The trust is—is in the nature of an employee benefit trust heed by its very terms by the amendment number 4 to a particular section of federal laws which deals with the employee benefit program, ERISA. The—the trust was amended by that fourth amendment by its—by the very terms of the fourth amendment to comply with the requirements of ERISA and very specifically addresses as we indicated in our statement and the facts that we have found such compliances to point of saying that all provisions of the agreement which are in conflict with the Employee Retirement Income—Income Security Act of 1974 are deleted. So that we have an entity which is controlled by a union group and employer group. We have an entity which is—is designed to fit within the requirements of federal law for—for compliance with the Employee Retirement Income Security Act of 1974. Now, that employee—compliance with that act yields several important benefits. It can yield exemption with respect to the employee from current income tax with respect to the benefits being provided to the employee and with respect to the employer—employer compliance with that act which we're referring to as ERISA can yield a present income tax deduction. In addition, compliance with that act can yield to the fund the trust, in this case freedom from current income taxation, and—and accordingly it—it's really the federal income tax treatment is inmaterial for New Jersey real property tax purposes. However, the

documents which indicate the intention to seek compliance with ERISA indicate the nature of the trust as a trust for the benefit of the employees ultimately. And the amendment number 4 contains various indication that the trust is for the benefit of the union employees. It is—it's not—it's not free from that self-interest, if you will. In addition, as in the—the Textile Research Institute case the—the conduct of the trust, the administration of the trust, is controlled by profit-making segments of society. The curriculum is strictly controlled and strictly related we find to the—the requirements to move from apprentice to journeymen carpenter, strictly related to a benefit which will flow to the employee members. The instrument itself is a revocable instrument. It is not an irrevocable instrument. And we'll—we'll come back to this issue when we deal with the Montclair case and the—the—the ultimate restplace of the enormous surplus which has accumulated within this trust. However, as in the Textile Research Institute case it was important to the Court that the—the benefit was flowing to an individual segment of society to a profit-making segment of society. We—we find this same flowing of benefit, this same thrust in the documents in this case. And—and, accordingly, on the first issue we find that as a result of the limitation of the curriculum as a result of the—the failure to have a benefit, the quid pro quo, which the—the Court has instructed us with respect to all types of exemption, and—and which is hinted, not hinted, which is—which is recited in—in cases cited within the Supreme Court's opinion in the Textile Research Institute case. It is a quid pro quo. It is the discharging of a—what the government or the public would have to undertake by the private organization which yields the exemption. I simply do not any more than as in the Textile Research Institute case they did not have that quid pro quo. Accordingly, I would find that it is not

conducted as a school, a college, an academy or a seminary. And for that reason alone the exemption must fail. Now, more importantly, on the second issue, the issue of whether the—the undertaking is for profit. We—we also find that the taxpayer fails to satisfy the standard as set out in—in the case cited by the municipality which is entitled The Kimberly School v. Town of Montclair, 2 NJ 28 1949. Now, here, we have as we have found irrevocable trust, irrevocable trust that may or may not be in compliance with ERISA. That's not material. May or may not be exempt for federal income tax purposes. That is not material to our decision, but it is reflective of the nature of the trust. It is reflective of the intention, the intention of the undertaking and of the trust. Here, we have a trust which is funded pursuant to a collective bargaining agreement. It is funded as a result of negotiations between an employer's group and the union representative of individuals. It's related to wages, not what it costs to produce the program. Now, we find that approximately, and—and these numbers are based upon the 1991 tax year. We had form 990 as we've indicated in evidence. It's a federal form, and it provides an enormous amount of—of information. Approximately 27.6 percent of the total revenue was required to cover the costs which the taxpayer has indicated on that return and in his testimony which are program services cost. An enormous surplus cost the evidence indicated was—was building and certainly contemplated. It was certainly contemplated when the agreement was amended to—to make it comply with ERISA requirements. It was certainly contemplated that there would be a fund administered, that the fund would far exceed the expenses to conduct the training program at the two facilities within the State of New Jersey. That fund, the—the terms of the trust provide was subject to the continuing control as to its ultimate

distribution of the trustees, the instrument being completely revocable, determined the instrument and the trust being tied to the substanance of the collective bargaining agreement between the union—union and the employer group. Now, the Montclair opinion sets out a number of factors which are—are helpful. And these are set out at page 38 of the opinion in analyzing the—the facts and the trust that—that we have in front of us. And the first looks to the character and membership of the board of trustees, not dissimilar from the undertaking in Textile Research Institute which is why we—we have the over—overlap and the tangling of issues. Here, we've got half union, half employer—employer representative. We've got advocates in—in a segment society that is—is profit-driven ultimately, far different from what the Court in the Montclair opinion was—was looking for. What the Court was looking for there was independent, not subjugation which we have in the facts here where we have a board completely controlled by—by interested parties. The second factor which the Court sets out in the Montclair, the amount of the excess income over cost and the possible use of such excess. And this is particularly sticky in the within case. The—the surplus that—that is indicated at the end of tax year 1991 in the taxpayer's form 990 consists of cash of approximately $1,290,689, accounts receivable of approximately $155,750, investments of $3,241,549, depreciated value of real estate of $4,948,349, for a total of $9,684,031. We show there is a schedule annexed to the form which at the year end 12/31/91 indicates an investment management account maintained at the United Jersey Bank totalling $4,287,232.05, producing an annual income of $314,256.15. It is certain and we find so that given expenses to run the program services indicated by taxpayer's expert which approximates $800,000 a year and

contributions for tax year 1991 exceeding $2.7 million, that being a year which taxpayer indicated was a low year, that the surplus will do nothing but continue to grow. It is—it is additionally important and—and—and we note that in accepting that—that figure with respect to program services we note that that in line 43 which is page 2 of form 990 and as confirmed not the number but the—the expenditure by the testimony of taxpayer's witness at trial one of the largest expense items after salaries, in fact, the largest expense item for salary, was contest expenses of $227,468 for that tax year. And those contest expenses as—as testimony indicated were to—to enter various contestants in contests across the country conducted among the various unions. So that that type of—of skewing when we look at the $800,000 expenditure and we look at contest expenses of—of nearly $230,000 which testimony indicated was—would have been a normal expense and we further look at a reimbursement which is included among the expenses, clearly probably should not have been included among those expenses of $68,892. We find that—that the number $800,000 for program services may in fact be—be somewhat misleading in light of—of the reimbursement. And in light of the testimony, I'm sorry, although clearly that wasn't included in the $800,000. Now, we have, therefore, and we find that we've got, and this is a third factor in—in the Montclair case, the—the amount of excess income over cost and the possible use of such excess. This is where the revocability of the trust and the control of the ultimate distribution of the trust assets vested in the trustee together with the ability of—of either group of trustees to ultimately terminate the—the trust to be troubling and to be—to be such that we simply cannot find that the—the trust can survive an attack on the profitability and attack on its character as primarily benefitting private parties.

Certainly the revocability being (indiscernible - muffled) is essential to our decision here. But—but we note again and—and we quoted that—that the trust is tied to—to what's going on among the various entities in—in the real world, in the profit-making world. It's just so tied and connected with employment that—that the very viability of the trust is—is turned on—on whether a collective bargaining agreement continues to be in place. Now, because of the—the connection and the purpose set out in the fourth amendment to—in the fourth amendment to the trust agreement to comply with ERISA, and ERISA being an employee benefit legislative provision under—under federal law dealing with employee benefits, benefits that are provided by employers to employees and—and the administration of funds which hold these benefits in order to obtain certain tax results in order to—to comply with the necessities of—of investing and reporting and administering these funds. We—we find that article 6 in reaching to be in compliance with this really indicates a character as an employee benefit fund. And accordingly this would be we find particularly important in the determination as to what ultimately will happen with the funds in the event that the trust terminates. If the trust is terminated either by an agreement between the employers and the employees and the trust might then, for example, fall into another employee benefit trust or in the event that the trust terminates and the trustees who are members of a profit-driven segment of society and self-interested direct that the trust assets return after the parties for whom they're obviously being held, the employees from whose wages the—the deduction of 1 percent were taken. That—that—this analysis and this agreement is not seen on this issue until reads all the amendments and—and takes a look at what is really going on here, in particular, the ability to revoke and terminate the trust, the ability to

amend the trust by virtue of amending the collective bargaining agreement. So that here we have the lack of certainty that the assets will not pass out to individuals, pass out to profit-making segment of society. And—and that—that is—is particularly important to our decision. There's—there's no clause which—which keeps and insures that this enormous surplus which will only continue to grow will ultimately and—and—and eventually be used for an exempt purpose. We don't have that certainty in the revocability and the nature as an employee benefit trust of the fund. Now, the fourth factor set out in the Montclair case was the amount of tuition charged as compared with those at similar schools. We have no tuition charged here. The tuition or the amount which the—which is paid into the fund is—is set by collective bargaining agreement, and obviously has nothing to do and we find based on the facts which we have before us that it has nothing to do with the cost to provide this—the training services. The fifth factor in the Montclair Kimberly case was the scale of salaries. And, here, the testimony was that the salaries are tied to union wage, plain and simple. They are not tied to—to—to what an instructor in a trade school, for example, would be making. And this is reflective of the nature of the—of the trust, is it for profit or is it not for profit, is a factor that—that in the Kimberly case the Supreme Court says we look at to get an idea as to the nature of the undertaking, the nature of the entities that we have before us. And this as this clearly indicates a for-profit mindset. Factor number 6 in that case is the dominant motive and—and here we—we've got the link controlled to the—to the profit-making entity. So accordingly we—we can't given the analysis and give the facts which we have analyzed as instructed by the Montclair Kimberly case we can't come to any conclusion other than that the trust is a

for-profit undertaking, that it is designed to—to receive pursuant to a collective bargaining arrangement the portion of what otherwise would have been paid to the employee, that it is designed to—to hold and to invest and to administer both a—a fund which is an employee benefit-type fund, and I'm using employee benefit type funding in quotes because the ultimate beneficiaries which are obviously the intended beneficiaries under the trust are—are the union members, the individual. So that those are—are the ultimate beneficiaries and there, the parties, not the public in general, but a very limited segment of society and the trust is clearly designed to be conducted in a manner to produce income, to produce income which is—is going to continue to accumulate and be added and become then a part of corpus, and corpus ultimately to be distributed as the trustees shall determine at some time in the future, whether the trust terminates or the agreement among unions and employer groups and collective bargaining agreement changes at some point in time so that the—the trust terms change, or whatever might happen, which is not particularly important at this time. What is important is the nature of the trust which we find to be for profit. And for all of those reasons we are affirming the assessment and the Clerk of the Court will be directed to enter judgement of in accordance with that affirmance. Thank you.

MR. RENAUD: Your Honor,

THE COURT: Yes?

MR. RENAUD: I said thank you, your Honor.

THE COURT: Thank you, Mr. Renaud.

MR. BORG: Your Honor, may I just note that our address has changed for both you and Bob and I will give it to you now so that the opinion is properly mailed out to me.

THE COURT: I can't hear you, Mr. Borg.

MR. BORG: Our address has changed.

THE COURT: I heard that, but that was it.

MR. BORG: Oh, OK. I want to give you the new one.

THE COURT: Why don't you write us a letter with the new address and then we'll have it of record in your file.

MR. BORG: OK.

THE COURT: If you would be kind enough to do that, we'd appreciate it. And, in fact, if you have a fax machine and you'd like to just fax it over that would be fine, too.

MR. BORG: OK. What's your number?

THE COURT: Pat, do you know the fax number?

MR. RENAUD: I know it, Judge. It's

COURT CLERK: 631-6396.

MR. RENAUD: That's it.

THE COURT: Thank you.

MR. BORG: 631

MR. RENAUD: Yes. 6396.

MR. BORG: 6396. Very good, your Honor.

THE COURT: Thank you.

MR. RENAUD: Thank you.

THE COURT: Bye.

MR. BORG: Bye.

(Case completed)

CERTIFICATION

I, Karen Antero, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Tax Court on September 23, 1994, Tape No. 1, Index No. 20 to 2043, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

Signature /s/ Karen Antero
Typed Name Karen Antero #106
& AOC #
Agency Name Karen Antero

Date: /s/ 10/29/94

54:4-3.6. Exemption of property of nonprofit organizations

The following property shall be exempt from taxation under this chapter: all buildings actually used for colleges, schools, academies or seminaries, provided that if any portion of such buildings are leased to profit-making organizations or otherwise used for purposes which are not themselves exempt from taxation, said portion shall be subject to taxation and the remaining portion only shall be exempt; all buildings actually used for historical societies, associations or exhibitions, when owned by the State, county or any political subdivision thereof or when located on land owned by an educational institution which derives its primary support from State revenue; all buildings actually and exclusively used for public libraries, religious worship or asylum or schools for feebleminded or idiotic persons and children; all buildings used exclusively by any association or corporation formed for the purpose and actually engaged in the work of preventing cruelty to animals; all buildings actually and exclusively used and owned by volunteer first-aid squads, which squads are or shall be incorporated as associations not for pecuniary profit; all buildings actually used in the work of associations and corporations organized exclusively for the moral and mental improvement of men, women and children, provided that if any portion of a building used for that purpose is leased to profit-making organizations or is otherwise used for purposes which are not themselves exempt from taxation, that portion shall be subject to taxation and the remaining portion only shall be exempt; all buildings actually and exclusively used in the work of associations and corporations organized exclusively for religious or charitable purposes; all buildings actually used

in the work of associations and corporations organized exclusively for hospital purposes, provided that if any portion of a building used for hospital purposes is leased to profit-making organizations or otherwise used for purposes which are not themselves exempt from taxation, that portion shall be subject to taxation and the remaining portion only shall be exempt; all buildings owned or held by an association or corporation created for the purpose of holding the title to such buildings as are actually and exclusively used in the work of two or more associations or corporations organized exclusively for the moral and mental improvement of men, women and children; all buildings owned by a corporation created under or otherwise subject to the provisions of Title 15 of the Revised Statutes or Title 15A of the New Jersey Statutes and actually and exclusively used in the work of one or mo e associations or corporations organized exclusively for charitable or religious purposes, which associations or corporations may or may not pay rent for the use of the premises or the portions of the premises used by them; the buildings, not exceeding two, actually occupied as a parsonage by the officiating clergymen of any religious corporation of this State, together with the accessory buildings located on the same premises; the land whereon any of the buildings hereinbefore mentioned are erected, and which may be necessary for the fair enjoyment thereof, and which is devoted to the purposes above mentioned and to no other purpose and does not exceed five acres in extent; the furniture and personal property in said buildings if used in and devoted to the purposes above mentioned; all property owned and used by any nonprofit corporation in connection with its curriculum, work, care, treatment and study of feebleminded, mentally retarded, or idiotic men, women, or children shall also be exempt from taxation, provided that such corporation conducts and

maintains research or professional training facilities for the care and training of feebleminded, mentally retarded, or idiotic men, women, or children; provided, in case of all the foregoing, the buildings, or the lands on which they stand, or the associations, corporations or institutions using and occupying them as aforesaid, are not conducted for profit, except that the exemption of the buildings and lands used for charitable, benevolent or religious purposes shall extend to cases where the charitable, benevolent or religious work therein carried on is supported partly by fees and charges received from or on behalf of beneficiaries using or occupying the buildings; provided the building is wholly controlled by and the entire income therefrom is used for said charitable, benevolent or religious purposes. The foregoing exemption shall apply only where the association, corporation or institution claiming the exemption owns the property in question and is incorporated or organized under the laws of this State and authorized to carry out the purposes on account of which the exemption is claimed or where an educational institution, as provided herein, has leased said property to a historical society or association or to a corporation organized for such purposes and created under or otherwise subject to the provisions of Title 15 of the Revised Statutes or Title 15A of the New Jersey Statutes.

As used in this section "hospital purposes" includes health care facilities for the elderly, such as nursing homes; residential health care facilities; assisted living residences; facilities with a Class C license pursuant to P.L.1979, c. 496 (C. 55:13B-1 et al.), the "Rooming and Boarding House Act of 1979"; similar facilities that provide medical, nursing or personal care services to their residents; and that portion of the central administrative or service facility of a continuing care retirement community

that is reasonably allocable as a health care facility for the elderly.

Amended by L.1993, c. 166, § 1.

Supreme Court, U.S.
F I L E D
APR 22 1997
CLERK

No. 96-1532

In The

Supreme Court of the United States

October Term, 1996

NEW JERSEY CARPENTERS APPRENTICE TRAINING AND EDUCATION FUND,

Petitioner,

vs.

BOROUGH OF KENILWORTH, NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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8 pp

QUESTION PRESENTED

Respondent disagrees with the statement of the question posed by Petitioner. Respondent states the question thusly:

> **May the New Jersey Supreme Court interpret a New Jersey Statute exempting a "school" from New Jersey real estate taxes differently than the Internal Revenue Service interprets an Internal Revenue Code provision exempting "educational institutions" from federal income taxation?**

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Rule Cited:	
United States Supreme Court Rule 14(1)(g)(i)	4

Respondent requests that the Court deny the Petition for a Writ of Certiorari filed by the New Jersey Carpenters Apprentice Training and Education Fund seeking review of an opinion of the Supreme Court of the State of New Jersey denying a tax exemption. The opinion of the New Jersey Supreme Court is reported at 147 N.J. 171, 685 A.2d 1309 (1996).

STATEMENT OF JURISDICTION

Contrary to Petitioner's assertion, the Court does not have jurisdiction to review the decision of the Supreme Court of the State of New Jersey under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Subject to the exception set forth below, Respondent accepts Petitioner's statement of the case.

The Supreme Court of New Jersey did not note that its definition of a "school" contradicts the Internal Revenue Service's definition of that term (Petition at 7). The New Jersey Supreme Court was contrasting the terms used in the Internal Revenue Code, specifically IRC § 501(c)(3), "corporations, and any community chest, fund or foundation, organized and operated exclusively for . . . educational purposes" with the specific exemption from New Jersey real estate taxes claimed by Petitioner in N.J.S.A. 54:4-3.6, "colleges, *schools*, academics or seminaries" (Petitioner's Appendix, A-22, 23).

Additionally, the Supreme Court of New Jersey did not explicitly acknowledge that its definition of a "school" is repugnant to the definition of that term under federal law (Petition at 8). Instead, the Court contrasted the broad construction which the Internal Revenue Service has applied to exemptions, under the Internal Revenue Code (Petitioner's

Appendix, A-22) and the broad construction given by some state courts respecting property tax exemptions (Petitioner's Appendix, A-22) with the strict construction applied to exemptions by other states (Petitioner's Appendix, A-19) and the New Jersey rule that "exemption laws are strictly construed against the taxpayer, and the taxpayer bears the burden of proving the exemption" (Petitioner's Appendix, A-23).

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION.

Under 28 U.S.C. § 1257(a), final judgments or decrees rendered by the highest court of the state may be reviewed by the Supreme Court: (1) where the validity of a treaty or statute of the United States is drawn in question; or (2) where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or (3) where any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States. Petitioner relies upon the second listed ground. However, the Petition does not assert that the validity of the statute in question, N.J.S.A. 54:4-3.6, is repugnant to the Constitution or any treaty or law of the United States. The Petition simply asserts that the New Jersey Supreme Court has interpreted the word "school" in construing the New Jersey real estate tax exemption statute differently than "educational purposes" have been construed under the Internal Revenue Code. Such does not demonstrate a "repugnancy" between the state and federal statutes. States are free to set their own criteria for exemptions from state taxes. They need not be the same as the criteria for federal tax exemption.

II.

THE COURT SHOULD DENY THE PETITION BECAUSE NO FEDERAL QUESTION IS PRESENTED.

The issue in the case was clearly set forth in the opinion of the New Jersey Supreme Court:

> N.J.S.A. 54:4-3.6 exempts from real property taxation any building that (1) is actually used as a "school" and (2) is "not conducted for profit." Plaintiff, the New Jersey Carpenters Apprentice and Education Fund (Fund) owns a building in which it operates a training center for apprentices. The question to be resolved in this case is whether that building is exempt under N.J.S.A. 54:4-3.6. (Petition's Appendix, A-2).

The New Jersey Supreme Court answered in the negative. This is a case of a state court interpreting a state law. No federal question is presented. The Court should deny the Petition on that ground.

III.

THIS COURT SHOULD DECLINE TO REVIEW THIS CASE BECAUSE THE ISSUES PRESENTED BY PETITIONER WERE NEITHER RAISED NOR DECIDED IN THE STATE COURT BELOW.

Where issues have not been raised in state court proceedings, the United States Supreme Court should decline to grant Petitions for Writs of Certiorari, *Ellis v. Dixon*, 349 U.S. 458 (1955), *rehearing denied*, 350 U.S. 855 (1955); *Yee v. City of Escondido*,

503 U.S. 519 (1992); *Beck v. Washington*, 369 U.S. 541 (1962). Rule 14(1)(g)(i) of the United States Supreme Court Rules requires the Statement of the Case in the Petition, where a review of a state court judgment is sought, to contain a specification of the stage in the proceedings when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed on by those courts. A review of the entire Petition, including the Appendix containing the decisions below, makes clear that these alleged federal questions were never raised in the state courts. The Petition appears to acknowledge as much (Petition at 9), but does not expressly so state. Since the Petitioner did not raise these issues below, it should not be heard to raise them now.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Writ of Certiorari be denied.

Respectfully submitted,

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